

Articles

LABOR'S FRAGILE FREEDOM OF ASSOCIATION POST-9/11

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I. INTRODUCTION

"Freedom of association" is an American ideal much like "free speech," but neither is free nor absolute. Qualifications limit both of these concepts. There is the Holmesian precept that one may not "yell fire in a crowded theater" when there is no fire and claim First Amendment protection.¹ Similarly, freedom of association can be limited in certain circumstances in order to protect public safety, enforce anti-discrimination laws, and prevent unlawful conspiracies.² The historical difficulty has always been to strike the appropriate balance between civil liberties and the protection of order during periods of domestic insecurity, such as wartime, terrorist attacks, or the Cold War on communism.³

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1. *Schenk v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.").

2. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (stating that the right of association does not prevent enforcement of anti-discrimination laws).

3. *See, e.g., Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J.,

This Article examines the proper limits of labor's freedom of association in the United States since the terrorist attacks of September 11, 2001. Section 7 of the National Labor Relations Act of 1935 (NLRA) defines labor's freedom of association as:

[T]he right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁴

While section 7 of the NLRA is the foundation of the rights guaranteed to American private sector workers, it is only the starting point for labor's freedom of association. The NLRA protects those workers defined by the statute as "employees."⁵ Many of the principles embodied in the NLRA are afforded to public sector employees through the Constitution, federal statutes, and state-by-state regulation. All public and private sector employees, on the other hand, are protected by international labor laws regarding the freedom of association and the right to organize and bargain collectively.

The question is whether or not labor's freedom of association has been harmed in the post-9/11 period as a result of national security concerns. I argue that labor's freedom of association, like other civil liberties, is under stress in the post-9/11 period because of certain federal legislation and actions by the Executive Branch. In addition, decisions of the courts and administrative adjudicators have limited labor's freedom of association over exaggerated concerns about national security. This stress can be relieved through judicial reaffirmation of the principles embodied in section 7 of the NLRA and the U.S. Constitution, and also by upholding the international principles to which the U.S. government must conform.

The post-9/11 strain upon labor's freedom of association has deep historical roots in other periods of domestic insecurity. Many look to the history of labor's freedom of association and see destabilizing strikes, inflexible bureaucracies and increased immigration—all of which are thought to threaten national security. These same concerns about labor activity are present post-9/11. This Article's main argument is that the post-9/11 environment of fear and insecurity has weakened labor's freedom of association through actions by Congress and the President, and through decisions of the courts and the National Labor Relations Board (NLRB or "Board"). International legal instruments call into question the actions of

dissenting) (noting that government's power to restrict speech is greater in times of war than in times of peace "because war opens dangers that do not exist at other times").

4. 29 U.S.C. § 157 (2000).

5. See 29 U.S.C. § 152(3) (2000) (defining "employee").

government agencies and courts in the post-9/11 period that have used national security and fears of terrorism to limit labor's freedom of association.

The thesis described above is based on three interrelated foundations. First, labor's freedom of association should be considered in tandem with the other recognized "political" civil liberties, such as freedom of speech and assembly, freedom from unreasonable search and seizures, due process, and the right to vote. The right of private sector workers to picket, speak, and assemble is protected, within limits, against governmental interference by the First Amendment. Public employees can invoke First, Fourth, Fifth and Fourteenth Amendment protections, within limits, against their governmental employers. Thus, labor and employment rights historically have been inextricably linked to civil liberties.

The second theoretical foundation follows from the first. If labor organizing and association is a civil liberty, then Congressional limitations on the freedom of speech, assembly, and privacy will affect labor's freedom of association. This exemplifies the theory that the retrenchment of rights against one group of people leads to the reduction of other liberties and the limitations of the rights of other groups. In modern politics, much of the focus on security has been on increasing border security, stripping jurisdiction to hear the appeals of immigrants, and scrutinizing the associations of noncitizens as potential "terrorist organizations." Labor unions today see much of their growth, as they have throughout history, in immigrants seeking a better life. Immigrants, whether documented or not, can be chilled from exercising their freedom of association rights guaranteed by federal and international law if they will be ensnared by laws which guarantee deportation or detention for past minor criminal acts, innocent affiliations, or unlawful entry. The post-9/11 period has seen a proliferation of legislation making it harder to challenge governmental actions against immigrants.⁶

Finally, courts have erred on the side of public order when adjudicating civil liberties during wartime and other times of national instability, such as the World War I era and now the War on Terror. There have been some examples of judicial intervention to protect rights during all of these periods. Historically, however, the courts have largely deferred to the government at the beginning of perceived crises but eventually

6. See Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002) (examining the implications of post-9/11 immigration enforcement); see also Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1049 (2002) ("[T]he executive appears to have exceeded the reasonable scope of any inherent executive powers in national security affairs by proscribing federal courts and habeas corpus jurisdiction without congressional approval.").

moved to protect rights. Private entities have benefited from the courts' preference for public order in times of instability. Labor adjudication since 9/11 shows that actions by private employers and employees that might have an effect on national security result in courts and administrative agencies minimizing labor's freedom of association in favor of perceived security concerns. This concern over national security can be seen in cases involving: (1) retaliation by private sector employers against undocumented immigrants; (2) the right of nonunion workers to have a fellow employee present during disciplinary interviews; and (3) the question of labor rights for private sector employees performing federally mandated security functions. In each of these cases, labor adjudicators have either used terrorism to legitimize actions that they would have taken regardless of security concerns, or they have overreacted to the claim that labor's freedom of association threatens national security.

Part III of this Article explores how the three previously described theoretical foundations explain the actions of the President and Congress in the post-9/11 period. The national instability occasioned by the 9/11 attacks and the War on Terror has weakened labor's freedom of association in four areas: (1) the USA PATRIOT Act, which facilitates greater surveillance and privacy violations in private sector workplaces; (2) the use of labor law emergency powers to end a 2002 port strike on the West Coast; (3) the loss of collective bargaining rights by security screeners at the nation's airports; and (4) the overhaul of civil service rules in federal personnel systems. All of these actions were facilitated by long-standing rhetorical connections between collective bargaining, terrorism, and instability.

In Part IV, I discuss labor law adjudication in the post-9/11 period. In several decisions since 9/11, concerns about terrorism have affected the courts' and the NLRB's decisions in direct and indirect ways. The question of whether or not undocumented immigrants should have access to the same remedies available to authorized workers for unfair labor practices came before the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*.⁷ Although not directly addressed in the decision, the immigration control system's failure to keep the 9/11 hijackers out of the United States probably led to the Court privileging immigration control over labor rights in *Hoffman*. The NLRB has also decided cases since 9/11 where terrorism was both a subtext and an explicit justification for decisions that limited labor's freedom of association.

Although labor's freedom of association is protected by federal statutes and constitutional law, domestic law has proven an inadequate foundation for these labor rights. Thus, in Part V, I look to international

7. 535 U.S. 137 (2002).

law to strengthen labor's freedom of association. The application of international law is controversial. Some believe that international law intrudes too far into the nation's sovereign ability to determine its own laws, while many labor rights advocates believe that international law provides an inadequate enforcement mechanism for domestic labor violations. Indeed, there is much room for improvement in the enforcement of international labor rights. An answer to both the poor enforcement critics and the sovereignty critics is that international labor law principles are already part of the fabric of U.S. law through ratified treaties and incorporation of the "Law of Nations" into federal statutes such as the Alien Tort Claims Act.⁸ Thus, courts and administrative agencies, in their enforcement of *domestic* labor law, should take into account relevant international principles as a backdrop when domestic labor law does not provide a clear answer.

Courts and administrative agencies can separate legitimate national security concerns from pretext through more attention to the empirical realities that show why freedom of association and collective bargaining are not threats to national security. National security may be *better* served by respecting labor's freedom of association because unionization results in lower turnover rates, higher wages, protection for whistleblowers, and greater democratic participation.

II. THEORETICAL FRAMEWORK: LABOR AND LIBERTIES IN TIMES OF EMERGENCY

The three theoretical foundations of this Article are: (1) the rights to organize and bargain collectively, in addition to being fundamental human rights, are also civil liberties; (2) the retrenchment of rights in specific areas of public life leads to a devolution of rights in other areas, including private domains; and (3) historical events affect the way that adjudicative bodies decide and justify cases. I will discuss each of these foundations in turn.

A. *Connections Between Civil Liberties and Labor Rights*

"Civil liberties" are fundamental individual rights that are protected by law against unwarranted governmental or other interference. Rights are often considered civil liberties because they are essential to the proper functioning of the democratic process. Thus, common civil liberties include freedom of speech, freedom of assembly, and the right to vote.⁹

8. See 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

9. U.S. CONST. amends. I & IV.

These civil liberties have been woven into the historical fabric of American society through the U.S. Constitution and the Bill of Rights. Civil liberties are particularly fragile during times of domestic insecurity. Liberties such as freedom of speech, freedom to associate in political organizations, and freedom from unreasonable searches and seizures have been historically curtailed during war times such as World War II and the Cold War.¹⁰ This trend has continued during the U.S. government's response to 9/11: the War on Terror.¹¹

While labor rights are not specifically enumerated in the Constitution, they are firmly rooted in civil libertarian concepts. The right to organize as private sector employers is protected primarily by the NLRA.¹² However, the basis for the right to organize arises out of the rights of free speech and freedom of assembly. Similarly, the freedom of workers to act collectively is derived from basic civil liberties.¹³

As case law shows, civil liberties have played a major role in cases regarding the right to organize. In the 1937 decision *Hague v. Committee for Industrial Organization*, the U.S. Supreme Court held that the right to free speech includes labor picketing.¹⁴ Three years later, in *Thornhill v. Alabama*, the Court held that ordinances prohibiting injury to businesses could not be enforced against lawful boycotting and picketing activities

10. See JUDITH STEPAN-NORRIS & MAURICE ZEITLIN, *LEFT OUT: REDS AND AMERICA'S INDUSTRIAL UNIONS* 101 (Cambridge University Press 2003) (exploring unionism during the Cold War era); see also ARTHUR KINOY, *RIGHTS ON TRIAL: ODYSSEY OF A PEOPLE'S LAWYER* 99–114 (Harvard University Press 1983) (arguing that the Cold War was a way to blunt labor's militancy).

11. The U.S. led "War on Terror" defies logical definition because, as Noam Chomsky has pointed out, the definition of what is "terror" shifts depending on who is waging it. See Noam Chomsky, *DISTORTED MORALITY: A WAR ON TERROR?*, Lecture at Harvard University (Feb. 2002), available at <http://www.chomsky.info/talks/200202--02.htm> (exploring how "terror" has been defined throughout history). Perhaps recognizing that "War on Terrorism" was a poor description, Bush administration officials started using the term "global struggle against violent extremism." See Eric Schmitt & Thom Shanker, *New Name for "War on Terror" Reflects Wider U.S. Campaign*, N.Y. TIMES, Jul. 26, 2005, at A7 ("Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, told the National Press Club . . . that he had 'objected to the use of the term "war on terrorism" before, because if you call it war, then you think of people in uniform as being the solution."'). See also PHILLIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 87 (2003) (questioning the metaphor of a war on terror because it fails to take into account the non-temporary nature of the war and the lack of a clearly defined enemy). For the purposes of this Article, however, I will define "the War on Terror" as the U.S. government's response to the terrorist attacks of September 11, 2001.

12. 29 U.S.C. §§ 151–169 (2000).

13. The First Amendment to the United States Constitution states, in the part relevant to this Article, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

14. 307 U.S. 496 (1939).

under the First Amendment.¹⁵ In addition, the First Amendment protects labor against repression from state law enforcement and state employers.¹⁶ Government employees, subject to some exceptions, are also protected by the First Amendment when they attempt to organize unions.¹⁷ As early as 1945, however, the U.S. Supreme Court made it clear that, for public employees, the right "to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them" is protected not only as a part of free speech, but as part of free assembly.¹⁸

Further, the right of association, grounded in the "right of the people peaceably to assemble" in the First Amendment, was first recognized in cases preventing government interference in the organizational activities of civil rights groups such as *NAACP v. Alabama ex rel Patterson*.¹⁹ More recent Supreme Court cases, such as *Boy Scouts of America v. Dale* and *Hurley v. Irish-American Gay Group of Boston*, have protected the rights of organizations to exclude members on account of sexual orientation.²⁰ This latter conception of freedom of association is an example of the negative conception that government's role is to protect the right to exclude from

15. 310 U.S. 88 (1940).

16. First Amendment protection is not absolute, however. See *Waters v. Churchill*, 511 U.S. 661, 674 (1993) ("[C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign."); *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 460 (7th Cir. 1972) (acknowledging that not "all activities of a union or its members are constitutionally protected"); *Am. Fed'n of State, County, & Municipal Employees v. City of Muskegon*, 120 N.W.2d 197 (Mich. 1963) (finding that contracts prohibiting public employees from joining unions are constitutionally permissible).

17. See *Am. Fed'n of State, County, & Municipal Employees v. Woodward*, 406 F.2d 137, 140 (8th Cir. 1969) ("No paramount public interest . . . warranted limiting the plaintiff's right to freedom of association."); *McLaughlin v. Tilendis*, 398 F.2d 287, 288-89 (7th Cir. 1968) ("Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendment rights by teachers will usually not warrant their dismissal. . . . Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment."); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (holding a state statute prohibiting union participation by government employees unconstitutional). But see *Smith v. Ark. City Employees*, 441 U.S. 463 (1979) (standing for the idea that the First Amendment may give public employees the right to associate, but it does not give them a protected right to bargain).

18. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)).

19. 357 U.S. 449 (1958).

20. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557 (1995). See Seana Valentine Shiffrin, *What's Really Wrong with Compelled Association?*, 99 Nw. U. L. REV. 839 (2005) (advocating freedom of association, including the freedom to exclude unwanted members, because freedom of association is an amplification of freedom of speech); see also Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 75 (Amy Gutmann ed., 1998) (rejecting the principal justifications offered for compelled association).

associations, rather than the positive conception that government's role is to encourage associations of disparate groups and people.²¹

In addition to its inherent protection by the First Amendment, labor's freedom of association has been protected by federal statute since 1935. In section 1 of the NLRA, Congress declared:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.²²

Congress saw freedom of association as crucial to equalize the balance of power between employers and employees. Section 7 of the NLRA protects freedom of association against interference by private sector employers. Section 7 protects employees' "right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."²³ Freedom of association is not important for merely economic purposes. Employee associations have long been active participants in the democratic process.²⁴ In the 2004 election, for example, votes from union households accounted for 24% of all votes, even though only about 8% of all private sector workers are in unions.²⁵ Section 7 also explicitly protects the right *not* to associate, which has led to decisions affirming the right of workers to opt out of political activities.²⁶

The right to associate in section 7 of the NLRA also includes the right to strike and engage in related informational activities (such as picketing, boycotts, and leafleting), subject to the express and implied restrictions

21. See SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* (1992) (discussing how the freedom *not* to associate follows from the freedom to associate).

22. 29 U.S.C. § 151 (2000).

23. 29 U.S.C. § 157 (2000).

24. EDWARD S. GREENBERG, *WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION* 122–28 (1988).

25. Steven Greenhouse, *Four Major Unions Plan to Boycott A.F.L.-C.I.O. Event*, N.Y. TIMES, July 25, 2005, at A1.

26. Section 7 explicitly states that employees have "the right to refrain" from concerted activities. 29 U.S.C. § 157 (1994). See *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988) (finding required union fees for politics a violation of fair representation); see also *Chi. Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (invalidating mandatory union fees for non-bargaining purposes).

imposed by other parts of the NLRA.²⁷ The right to strike is considered part of the “concerted activities for the purpose of collective bargaining or other mutual aid or protection” that are protected by section 7.²⁸ While NLRA section 8(a)(5) places a duty to bargain in good faith with the union selected by the majority of workers at a workplace, section 7 also protects employees’ right to bargain “through representatives of their own choosing.”²⁹

In addition to constitutional and statutory protections, the rights to associate, to bargain collectively, and to strike are recognized as fundamental human rights in several international treaties to which the United States is a signatory (discussed in detail in Part V). All of these rights begin with the freedom of association.³⁰ “Freedom of association” in the international context refers primarily to the freedom to form and join labor unions, though the freedom to join any association is contemplated by the international standards. Governments have affirmative obligations under these treaties not to harm the right to associate. Even though private parties are primarily responsible for denials of the right to organize, governments have an affirmative obligation under these international treaties to protect these rights through enforcement and legislation. Trade agreements also place this requirement on the United States.³¹

There is some dispute about whether or not the “choice not to associate” is in keeping with the international conception of freedom of association. Roy J. Adams writes, “[I]n Europe the hypothetical right to desist from participating in enterprise decision-making is not considered to be legitimate.”³² Indeed, the claim that workers should have the choice to

27. See, e.g., 29 U.S.C. § 158(b)(4) (2000) (prohibiting secondary boycotts and picketing of a neutral employer in labor disputes).

28. See *NLRB v. Wash. Aluminum*, 370 U.S. 9, 12–13 (1962) (allowing employees to act in concert in protest of work conditions); *NLRB v. Mackay Radio & Tel.*, 304 U.S. 333 (1938) (ruling that striking employees acting in concert could not be discriminated against).

29. 29 U.S.C. § 157 (1994). See also § 158(a)(5) (requiring an employer to bargain collectively with representatives of his employees); CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005) (exploring section 7 as protection for a minority of workers at a workplace).

30. See Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers’ Right, Human Right, International Right?*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 61 (Philip Alston ed., 2005); Stuart White, *Trade Unionism in a Liberal State*, in *FREEDOM OF ASSOCIATION* 330 (Amy Gutmann ed., 1998) (noting the importance of trade unions to the associational life of Britain and the United States).

31. See, e.g., North American Free Trade Agreement, North American Agreement on Labor Cooperation, Principle 1, available at <http://www.naalc.org/english/objective.shtml> (last visited Jan. 15, 2006) (agreeing that NAFTA member countries, such as the United States, are committed to promoting freedom of association).

32. Roy J. Adams, *Voice for All: Why the Right to Refrain from Collective Bargaining Is No Right at All*, in *WORKERS’ RIGHTS AS HUMAN RIGHTS* 142, 147 (James A. Gross ed., 2003).

bargain individually with an employer may be akin to saying that the law protects the choice of the rich and poor alike to sleep beneath bridges—the rich are the only ones who can be said to have a real choice.³³ Nevertheless, the International Labor Organization (ILO) has recognized that the right not to associate is a corollary to the right to associate, so there is apparently little difference between the liberties protected by the ILO and the U.S. Constitution. An array of federal laws and rulings make it clear that unions have no concomitant right to exclude members with whom they would rather not associate.³⁴

As the ILO has recognized, “political” civil liberties are a necessary precondition for the effective exercise of labor’s rights of association and collective bargaining.³⁵ Countries with a history of political repression, such as China, Burma (now Myanmar) and Indonesia have restricted the rights of free and independent trade unions.³⁶ The Solidarity movement in Poland is an example of the way that global labor movements have led to democratic change and of the connection between civil liberties and labor rights.³⁷ The strikes of the Solidarity movement played an important role in the opening of Polish society.³⁸

33. “The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread—the rich as well as the poor.” Anatole France, *THE NEW LAWYER’S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION*, IN BRIEF 19 (Kathryn Zullo et al. eds., 2001).

34. See 29 U.S.C. § 158(b)(2) (1994) (stating that employees cannot be dismissed for failing to be full-fledged members of the union); Landrum-Griffin Act, 29 U.S.C. §§ 411(a)(1)–(2) (2000) (guaranteeing equal rights of union members and the right of union members to free speech and assembly); 42 U.S.C. § 2000e-2(c) (2000) (applying anti-discrimination laws to the practices of labor organizations); *Vaca v. Sipes*, 386 U.S. 171 (1967) (holding that a union has a duty of fair representation to members and nonmembers alike as the statutory bargaining representative).

35. See Bernard Gernigon, et al., *Freedom of Association, in Fundamental Rights at Work and International Labour Standards*, Principle 2.3.1 at 13 (International Labour Organization 2003) (stating that freedom of association is dependent on civil and political rights).

36. See, e.g., Sara Davis & Mickey Spiegel, *Take Tough Action To End China’s Mining Tragedies*, WALL ST. J., Feb. 18, 2005, at A7 (detailing the illegal condition in some of China’s mines); Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1 (describing suit alleging violation of human rights by Unocal in Myanmar); U.S./Indonesia: Bush Backtracks on Corporate Responsibility, HUMAN RIGHTS WATCH, Aug. 7, 2002, available at <http://www.hrw.org/press/2002/08/exxon080702.htm> (reporting charges brought against Exxon Mobil for human rights violations in Indonesia).

37. See, e.g., LAWRENCE GOODWYN, *BREAKING THE BARRIER: THE RISE OF SOLIDARITY IN POLAND* 226–35 (1991) (recounting the initial stages of the Solidarity movement in Poland’s labor movement); Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 621 (2005) (pointing to the Polish solidarity movement as evidence of the important role played by unions in forming democracies).

38. See, e.g., Shannan C. Krasnokutski, *Human Rights in Transition: The Success and*

The connections between civil liberties and the fundamental rights to organize have been implicit for some time. This Article makes these connections explicit. This Article begins from the theoretical assertion that labor rights are themselves civil liberties because labor rights cannot exist in the absence of civil liberties. One of the reasons that labor's freedom of association is protected by international law is the positive relationship between an independent trade union movement and the exercise of other internationally recognized rights to speech, assembly, and democratic representation. Like other civil liberties, labor's rights to organize and bargain collectively are threatened in times of domestic insecurity.

B. The Retrenchment of Rights

Political repression in a particular social context often leads to repression in other spheres of democratic societies. I call this effect the "retrenchment of rights." Once rights for one group of people are diminished, the retrenchment process provides the momentum and justification to suppress rights of other interrelated groups.

Scholars have observed these effects in other periods of history.³⁹ For example, Alexander Tsesis has argued that hate speech movements lead to official repression against minorities.⁴⁰ In addition, Richard Delgado's theory of "justice at war" posits that minorities are at risk in times of attacks on civil liberties.⁴¹ David Cole argues that repression against noncitizens eventually leads to limitations on the rights of citizens.⁴²

The post-9/11 political and socioeconomic climate has triggered a new era in the devolution of rights. Efforts to curb terrorism have led to a diminution of civil liberties through laws such as the USA PATRIOT Act.⁴³

Failure of Polish and Russian Criminal Justice Reform, 33 CASE W. RESERVE INT'L L. J. 13, 19–23 (2001) (noting that the Solidarity movement was critical in removing communism from Poland).

39. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003) (evaluating the rights afforded to aliens post-September 11); RICHARD DELGADO, *JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS* 66–69 (2003) (describing the erosion of civil liberties in wartime); ALEXANDER TSEIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002) (analyzing instances where freedom of speech led to harmful events); William D. Hartung, *Homeland Insecurity: The War on Terror and the War on Labor*, 13 NEW LABOR FORUM 9 (2004) (describing the ways that the War on Terror has reduced domestic social programs for working people).

40. TSEIS, *supra* note 39.

41. See DELGADO, *supra* note 39, at 57–58 (arguing that wartime emergencies are used to excuse the violations of civil rights).

42. COLE, *supra* note 39. See also DELGADO, *supra* note 39, at 167 (citing the treatment of Mexicans as an example).

43. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115

As I will discuss in this Article, the USA PATRIOT Act has attacked key civil liberties such as the right to be free from unreasonable searches and seizures, freedom of speech, and privacy.⁴⁴ This initial attack on civil liberties has devolved into an offensive on workers' rights. This Article analyzes how the goal of preventing terrorist activities has also been used as justification for curbing the rights of workers, particularly the right of association. This degeneration of rights is the latest manifestation of reducing the rights of workers in the name of national security.

It is important to note that the retrenchment of rights is caused by the complex interaction of many factors. Historically, there have been many political and socio-economic factors that have led to the diminution of workers' rights. However, restrictions on one group in the name of a goal such as national security helps provide justification and momentum for imposing restrictions on other groups.

C. *In the Name of Security: Rhetoric, Causation, and Legitimization*

This Article proceeds from the legal realist view that historical events affect legislation and adjudication.⁴⁵ While one cannot always claim direct

Stat. 272 (2001).

44. See Kevin R. Johnson, *Civil Liberties Post-September 11: A Time of Danger, A Time of Opportunity*, 2 SEATTLE J. FOR SOC. JUST. 3 (2003) (providing an overview of articles which discuss civil liberties and post-9/11 legislation); Natsu Taylor Saito, *For "Our" Security: Who Is an "American" and What Is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. FOR SOC. JUST. 23 (2003) (addressing the restrictions of civil liberties of immigrants due to the USA PATRIOT Act and, if passed, PATRIOT II); Nadine Strossen, *Suspected Terrorists One and All: Reclaiming Our Civil Liberties in the Total Information Awareness Age*, 2 SEATTLE J. FOR SOC. JUST. 15 (2003) (calling for limitations on the government's power to investigate personal information).

45. Legal realism posits that law can only be understood in its historical and social context. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995) (exploring the empirical study of the law as legal realism); Patricia Ewick, Robert A. Kagan & Austin Sarat, *Legacies of Legal Realism: Social Science, Social Policy, and the Law*, in *SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW* 1 (Patricia Ewick et al. eds., 1999) (introducing the study of law and social science); Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y. REV. 409 (1998) (examining the establishment of the Law and Society Association); Jonathan Simon, *Law After Society*, 24 LAW & SOC. INQUIRY 143 (1999) (discussing the interaction between the study of law and society); see also Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 117 (2002) (evaluating race and gender influence on new legal doctrine dealing with minorities and their bargaining power); Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* (David A. Martin & Peter H. Schuck, eds., 2005) (analyzing from a legal realist perspective the Supreme Court's rejection of a due process challenge to a statute mandating detention without bond for virtually all noncitizen offenders facing deportation in the post-9/11 environment).

causation between world events and legal decisions, the impact that social realities have on decision makers should not be underestimated. Furthermore, world events can serve to legitimize actions, reducing the scrutiny that the actions would have received were it not for the precipitating events.⁴⁶ Finally, judicial decisions cannot be easily divorced from their historical context, even when judges do not specifically refer to the events in their opinions.

One of the most infamous examples of this kind of legitimation is *Korematsu v. United States*.⁴⁷ The *Korematsu* decision quite explicitly was a product of its time. The U.S. Supreme Court was faced with the question of whether the President could suspend the constitutional rights of approximately 110,000 interned Japanese-American immigrants and citizens during World War II. In the wartime climate, it was not surprising that the Supreme Court found the racially motivated detention of certain people necessary for national security. In reaching that conclusion, the Court deferred to the military's and government's views of the threat that persons of Japanese ancestry posed to the country.⁴⁸ *Korematsu* was a product of several factors, such as racism, the need to regulate labor and immigration, and enhanced security concerns, but the decision was legitimized by the climate of fear that predominated in the country after the attack on Pearl Harbor.⁴⁹

D. *Historical Connections Among the Three Foundations*

The World War I era "Free Speech Fights" waged by the Industrial Workers of the World (IWW), also known as the "Wobblies," exemplify

46. See Susan Bibler Coutin et al., *In the Mirror: The Legitimation Function of Globalization*, 27 LAW & SOC. INQUIRY 801 (2002) (examining the legitimation work of globalization as a result of actual immigration, finance, and intercountry adoption event and policies).

47. 323 U.S. 214 (1944), *reh'g denied*, *Korematsu v. United States*, 324 U.S. 885 (1945).

48. See *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (giving deference to the military's decision). See also PETER IRONS, *JUSTICE AT WAR* 213-14 (1983) (recounting how then-California Attorney General Earl Warren presented testimony to Congress about the possibility of "sabotage and fifth-column activity" through Japanese associations); ERIC K. YAMAMOTO, ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 123 (2001) (studying the rationalization of discrimination based on race).

49. See Jerry Kang, *Denying Prejudice: Internment, Redress and Denial*, 51 UCLA L. REV. 933 (2004) (challenging the traditional view that the courts were "duped" by the Justice Department's exaggerated claims of the threat during wartime and pointing to racism as a contributing factor to the decision); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986) (reviewing the *Korematsu* decision and judicial oversight of military action for national security).

the interrelationship of all three theoretical foundations: (1) the connection between labor and civil liberties; (2) the effects of retrenchment of rights in times of crisis on bystander groups; and (3) the effects of historical context on judges. The Free Speech Fights were attempts by the IWW to challenge restrictions on speech by preaching their gospel of class conflict on downtown street corners. Although the IWW was a forerunner to the American Civil Liberties Union, the IWW was not strictly interested in free speech, but rather "one big union" that would have more leverage with employers and ultimately challenge the capitalist system.⁵⁰

Before the modern conception of freedom of association under the First Amendment, or its explicit protection in federal statutes and international law, the effects of denying civil liberties hit workers particularly hard, oftentimes with direct physical violence. Indeed, some members of the IWW engaged in violent tactics, but many of its members simply sought to leverage their power to engage in mass refusals to work. The IWW broke into two groups, one that advocated a socialist government, and another that simply wished to enhance bargaining power through a free-form association and disruptive strikes that were often at odds with employers and the established American Federation of Labor (AFL).⁵¹

In San Diego, California, government reaction toward the free speech fights was a typical example of repression toward workers associated with the IWW. The IWW rhetoric of class struggle was particularly worrisome to Southern Californians who saw revolution occurring in Mexico in 1911.⁵² Until that time, the IWW had been tolerated, and even given a corner in downtown San Diego to engage in free speech. After the Mexican revolution began, the local government began to crack down on the IWW and eventually passed an ordinance banning all speech in a forty-nine block area of downtown.⁵³ When the IWW violated the ordinance, attempting "to educate the floating and out-of-work population to a true understanding of the interests of labor as a whole," they were arrested and brutalized by police.⁵⁴ Citizen vigilantes volunteered to run the IWW out

50. See DIANE GAREY, *DEFENDING EVERYBODY: A HISTORY OF THE AMERICAN CIVIL LIBERTIES UNION* 49–52 (1998) (describing the history and formation of the ACLU).

51. See MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 444 (2d ed. 1988); HOWARD KIMELDORF, *BATTLING FOR AMERICAN LABOR: WOBBLIES, CRAFT WORKERS, AND THE MAKING OF THE UNION MOVEMENT* 49–55 (1999) (explaining how the Philadelphia Local simply wanted to reap the benefits from the wartime economy).

52. See Rosalie Shanks, *The I.W.W. Free Speech Movement: San Diego, 1912*, 19 J. SAN DIEGO HIST. 1 (1973), available at <http://www.sandiegohistory.org/journal/73winter/speech.htm> (documenting the events of the IWW in 1912).

53. *Id.*

54. *San Diego Free Speech Fight, 1912*, in *FELLOW WORKERS AND FRIENDS: I.W.W.*

of town and to prevent more from coming to San Diego.

The constitutional challenge to the San Diego "speech-free" zone was rejected by a state judge, who cited an appellate court decision sustaining a Los Angeles ordinance that had been the model for the one in San Diego.⁵⁵ The appellate court upheld the trial judge's ruling, holding that the ordinance was within the reasonable discretion of the city. The appellate court noted that, given the City's power to enact the ordinance, "the character or object of the assemblages prohibited are of no materiality, whatever the alleged public benefit they might have had."⁵⁶ It would be decades before similarly overbroad "free-speech-free zones" were seen as per se violations of the First Amendment.⁵⁷

The IWW was the target of repression by governmental entities at all levels. This repression reached a climax during World War I. Five months after the U.S. entered the war in April 1917, federal agents indicted several IWW leaders nationwide and began a series of show trials in major cities.⁵⁸ The most celebrated of these trials commenced in a Chicago federal court in April 1918. The charges consisted of various theories of criminal conspiracy, including counts of interference with employers' contractual rights, many of which would be discredited by the time the NLRA passed in 1935. In this environment, the government's case was largely based on guilt by association. This tactic proved successful, and the jury rendered a guilty verdict in the Chicago trial after deliberations lasting less than an hour. The same result occurred in other conspiracy trials.⁵⁹

The IWW trial in Chicago was only one element of the government's strategy to suppress dissent during World War I. As World War I raged overseas, the trial was part of an overall strategy of muzzling dissenters at home. It was no coincidence that many of those who were seen as a threat to American security were also leaders of radical workers' organizations, and in many cases they were noncitizens. This dragnet culminated in the Palmer Raids of 1919 to 1920, under the auspices of Attorney General

FREE-SPEECH FIGHTS AS TOLD BY PARTICIPANTS 131-32 (Philip S. Foner ed., 1981).

55. See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 115 (1997).

56. *Id.* (quoting *Ex parte Thomas*, 102 P. 19, 20 (Cal. Dist. Ct. App. 1909)).

57. See, e.g., *Bd. of Airport Comm'rs v. Jews For Jesus*, 482 U.S. 569 (1987) (ruling Los Angeles could not restrict First Amendment activities in its airport terminal).

58. See PATRICK RENSHAW, *THE WOBBLIES: THE STORY OF THE IWW AND SYNDICALISM IN THE UNITED STATES* 169-94 (New, rev. ed., Ivan R. Dee ed., 1999) (recounting the IWW trials); Harold Josephson, *Political Justice During the Red Scare: The Trial of Benjamin Gitlow*, in *AMERICAN POLITICAL TRIALS* 139 (Michal R. Belknap ed., 2d ed. 1994) (recounting the history of the trial of Benjamin Gitlow); see also MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 67 (1994) (explaining Congress' attack on the IWW); David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994) (noting that the meaning of free speech was a subject of popular concern before World War I).

59. RENSHAW, *supra* note 58.

Palmer, which resulted in the deportation of noncitizens deemed seditious to the war effort. Three large labor disputes in 1919—a police strike in Boston, and strikes in the mining and steel industries—fed into the climate of fear at the disruptive power of the labor movement.⁶⁰

The government quickly recognized how worker organization interfered with wartime objectives, since unregulated strikes during wartime would hamper the war effort. Anti-syndicalism laws were used to prosecute IWW activists even after World War I ended.⁶¹ These laws criminalized advocating the overthrow of the government by force or violence. California's Criminal Syndicalism Act, for example, criminalized anyone who organized or assisted in organizing, or who knowingly became "a member of[] any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism. . . ."⁶² Criminal syndicalism was defined as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."⁶³

In 1919, Charlotte Whitney was ensnared in the government's syndicalist prosecutions for organizing a California branch of the Communist labor party. Whitney was convicted for signing on to a statement that approved of strikes in Seattle and Winnipeg which "commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war."⁶⁴ The Supreme Court upheld Whitney's conviction on the ground that Whitney's associative activities smacked of "criminal conspiracy."⁶⁵ In a concurring opinion, Justice Brandeis expressed disdain for the fear that the Court validated in its opinion: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."⁶⁶ Justice Brandeis affirmed the conviction because he believed that the jury could have found criminal intent to

60. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 222 (2004) ("The *New York Tribune* warned that thousands of strikers, 'red-soaked in the doctrines of Bolshevism, clamor for the strike as a means of . . . starting a general red revolution in America.'").

61. Ashutosh M. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in *CONSTITUTIONAL LAW STORIES* 411 (Michael C. Dorf ed., 2004). Bhagwat states that the California statute was typical of the many state statutes "inasmuch as it was wielded primarily against the Wobblies." *Id.*

62. *Whitney v. California*, 274 U.S. 357, 360 (1927).

63. *Id.* at 359–60.

64. *Id.* at 364.

65. *Id.* at 372.

66. *Id.* at 377.

engage in unlawful acts, but he did not believe that the breadth of the anti-syndicalism statute itself could be justified.⁶⁷

Brandeis's 1927 concurring opinion in *Whitney* was one of the first steps toward an expansive view of the First Amendment.⁶⁸ Despite the limits of the First Amendment, the labor movement looked to protect its freedom of association through federal statute. After mass worker demonstrations in 1934, Congress passed the National Industrial Recovery Act (NIRA), which first guaranteed the right to organize. After the right to organize was protected by law, the more radical elements of the labor movement were tamed.

The IWW Free Speech Fights and the violent disruption that often accompanied labor strife show the interrelated nature of the three theoretical foundations of this Article. Throughout history, there has been a close connection between the right to speak and assemble and the right to associate in labor unions. The governmental reaction to the connection has led to the retrenchment of worker rights at the same time that political liberties like the right to speak and assemble were being limited. The violence that sometimes resulted from labor struggles was the product of both rogue elements within the labor movement and violent reaction by government officials. During periods of domestic insecurity, the judiciary has been reluctant to uphold civil liberties and labor rights, instead favoring governmental power, order, and stability, and the necessity for some reduction of rights in uncertain times. This dialectical relationship between labor's freedom of association and concerns about national security has played out since the September 11, 2001 terrorist attacks.

III. THE WAR ON WORKERS WAGED BY THE EXECUTIVE BRANCH AND CONGRESS

Although there were several terrorist attacks before 9/11, such as the 1993 bombing of the World Trade Center and the bombing of the USS Cole in 2000, few would dispute that the 9/11 attacks led to a heightened sense of insecurity in the nation.⁶⁹ Soon after the 9/11 attacks, Congress

67. RABBAN, *supra* note 55, at 370 (quoting *Gilbert v. Minnesota*, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting)).

68. *Id.* at 370–71. Brandeis's concurring opinion also laid the groundwork for the eventual invalidation of anti-syndicalism laws in *De Jonge v. Oregon*, 299 U.S. 353 (1937) (finding the defendant's conviction under the criminal syndicalism laws of Oregon in violation of the Due Process Clause of the Fourteenth Amendment) and *Herndon v. Lowry*, 301 U.S. 242 (1937) (finding the inmate's conviction in violation of the freedom of speech and assembly rights of the Fourteenth Amendment).

69. See RENATA L. MACK & MICHAEL J. KELLY, EQUAL JUSTICE IN THE BALANCE: AMERICA'S LEGAL RESPONSES TO THE EMERGING TERRORIST THREAT 30–32 (2004) (detailing terrorist attacks since 1975).

passed the USA PATRIOT Act ostensibly to provide legal tools to fight the War on Terror.⁷⁰ The USA PATRIOT Act gave the government tools to engage in the kind of “associational” profiling that challenges our shopworn conceptions of constitutional protections, such as “innocent until proven guilty” and “judicial review.”⁷¹ The increased scrutiny on immigrants and noncitizens since 9/11 has affected labor’s freedom of association.

Even before 9/11, immigrants in certain associations considered to be “terrorist organizations” by the U.S. government were singled out for scrutiny.⁷² The most famous such case was that of the “LA8,” a group of eight Palestinian immigrants living in Los Angeles who were members of the Popular Front for the Liberation of Palestine (PFLP). They engaged in fundraising activities ostensibly for the purpose of buying books, food, and other humanitarian supplies for Palestinian children. The U.S. government designated PFLP a “terrorist organization” under the Hobbs Act and moved to deport them.⁷³ A federal judge in Los Angeles found the government’s action to be an unconstitutional infringement on the immigrants’ First Amendment rights because the government had not proven that the immigrants intended to support any terrorist activities. The U.S. Supreme Court reversed the district court’s decision in *Reno v. American-Arab Anti-Discrimination Committee*, finding that a federal statute passed in 1996 gave the government the authority to deport the immigrants without judicial review.⁷⁴ The immigration system continues after 9/11 to be used to discourage membership in designated associations, even when the members’ goals are purely humanitarian. Thus, the concept of guilt by mere association, thought vanquished in previous constitutional rulings,⁷⁵ is

70. USA PATRIOT Act, 115 Stat. 272. See Muneer I. Ahmad, *A Rage Shared By Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) (discussing post-9/11 governmental policies based on race); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURV. AM. L. 295 (2002) (stating that the federal government restricted civil liberties to improve national security).

71. See COLE, *supra* note 39 (discussing guilt by association and the USA PATRIOT Act); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2d ed. 2002) (arguing that the war on terror can be fought without secret searches and guilt by association).

72. Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997).

73. *Am. Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *aff’d sub nom. Am. Arab Anti-Discrimination Comm. v. Thornburgh*, 940 F.2d 445 (9th Cir. 1991).

74. 525 U.S. 471 (1999).

75. See *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (stating that bar admission cannot be restricted through mere membership in a Communist party); *Yates v. United States*, 354 U.S. 298 (1957) (stating that the Constitution does not forbid teaching or

alive again after 9/11.

This Article focuses on how the climate of guilt by association has affected the climate for collective bargaining and the right of workers to freedom of association in the private and public spheres. In effect, the War on Terror has become a War on Workers. As will be discussed below, the USA PATRIOT Act has had both a direct and indirect impact on workers' rights. The process of retrenchment of rights can be seen in several examples. Government workers have also felt the reach of the new paradigm in the establishment of the Department of Homeland Security and efforts to reform the federal personnel system. All of these actions have been facilitated by the rhetoric of government officials connecting worker collective actions to national insecurity in the post-9/11 world.

A. *The USA PATRIOT Act: Direct and Indirect Effects*

The USA PATRIOT Act is a key example of the retrenchment of rights. It has become a symbol for what many see as the widespread threat to constitutional liberties in the post-9/11 era in the name of national security.⁷⁶ Some provisions of the USA PATRIOT Act strike broadly at civil liberties for all Americans. For example, the USA PATRIOT Act allows "sneak and peek" search warrants, where the subject of the search is not given notice of the search until after it is conducted. The constitutionality of these warrants has been strongly questioned by the courts over the last two decades.⁷⁷ The Act also legitimized unprecedented wiretap sharing between state and local law enforcement and intelligence agencies.⁷⁸ In addition, the USA PATRIOT Act requires nonprofit associations, as a condition of receiving deductions from federal employee

advocacy of overthrow of the government as an abstract principle).

76. See generally NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE* 11 (2003) (noting that the Bill of Rights was eroded "when the president signed the USA PATRIOT Act on October 26, 2001"); MACK & KELLY, *supra* note 69, at 116 (calling the PATRIOT Act "yet another glimpse of an America tragically surrendering her democratic principles to the whims of contemporary fears and prejudices"); Jerome M. Mileur & Ronald Story, *America's Wartime Presidents: Politics, National Security and Civil Liberties*, in *THE POLITICS OF TERROR: THE U.S. RESPONSE TO 9/11* 95, 118-27 (William J. Crotty ed., 2004) (discussing the threat of a surveillance state).

77. NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* 56 (2002). The courts have been split on the constitutionality of "sneak and peek" search warrants. Compare *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000) (finding delayed notification of searches and seizures of intangible evidence not a violation of the Fourth Amendment), with *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986) (holding sneak and peek search warrants unconstitutional) and *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993) (holding that sneak and peek search warrants, while not per se unconstitutional, violated the disclosure requirements of Federal Rule of Criminal Procedure 41).

78. CHANG, *supra* note 77 (citing section 218 of the USA PATRIOT Act).

paychecks, to ensure that the employees of the association are not on terrorist watch lists.⁷⁹ Finally, section 805(a)(2)(B) of the Act makes it illegal to provide “expert advice or training” to terrorist organizations. This provision was recently declared unconstitutionally vague by a federal judge in Los Angeles.⁸⁰

By limiting civil liberties, the USA PATRIOT Act has both direct and indirect effects on workers’ rights of association. An example of a direct effect can be seen in section 802 of the USA PATRIOT Act, which contains a definition of domestic terrorism that could extend to some of the protest activities of labor unions: “[A]cts dangerous to human life that are a violation of the criminal laws of the United States or any State [and] appear to be intended to intimidate or coerce a civilian population; [or] to influence the policy of government by intimidation or coercion. . . .”⁸¹ The broad contours of this new crime could be used to stifle many of the activities of the labor movement, such as those that occurred at the World Trade Organization and the G-8 summits in recent years.

Another example of the direct effect on workers’ rights is the provision stating that employers can cooperate with law enforcement officers seeking access to employee personnel files without violating Title VII of the Civil Rights Act of 1964, which would otherwise bar any inquiry based on race, religion or national origin. These examples illustrate how workers’ rights become precarious when civil liberties are decreased because labor’s freedom of association is so intrinsically intertwined with core civil liberties.⁸²

The post-9/11 environment and the USA PATRIOT Act have also had many indirect effects on labor. In order for workers to be able to exercise their right to organize effectively, they must be able to associate without fear of surveillance by their employers. This is why it is a violation of federal labor law for employers to engage in surveillance or create the impression of surveillance.⁸³

79. Controversy over participation in the watch list program recently erupted within the American Civil Liberties Union board. Adam Liptak, *A.C.L.U. Board Is Split Over Watch Lists*, N.Y. TIMES, July 31, 2004, at A1.

80. David Rosenzweig, *U.S. Judge Voids Portion of Patriot Act as Illegally Vague*, L.A. TIMES, July 30, 2005, at A19.

81. 18 U.S.C. § 2331(5) (Supp. 2001).

82. EEOC COMPLIANCE MANUAL, § 13-III(B)(1), available at <http://www.eeoc.gov/policy/docs/national-origin.html> (last visited Jan. 15, 2006) (prohibiting review of employment decisions based on national origin if those decisions were made in the interest of national security).

83. See *Dayton Hudson Corp.*, 316 N.L.R.B. 477, 488 (1995) (“It is well established that, absent legitimate justification, an employer’s videotaping or photographing of its employees, while they are engaged in protected concerted activities, constitutes unlawful surveillance, in violation of Section 8(a)(1) of the Act.”); see also *Palagonia Bakery Co., Inc.*, 339 N.L.R.B. No. 74 1, 32 (2003) (holding that following employees to a union

The USA PATRIOT Act has facilitated forms of employer surveillance. In fact, the Act changed the definition of when a communication is "stored" in the Stored Communications Act (SCA) in order to more easily obtain voice mail communications for law enforcement purposes.⁸⁴ This change meant that employers would also be freer to intercept electronic communications about associational activities. In *Konop v. Hawaiian Airlines*, Robert Konop created and maintained a website where he posted negative comments about Hawaiian Airlines and his union.⁸⁵ The company intercepted communications to and from the website, and Konop filed a lawsuit under the SCA against Hawaiian Airlines. The district court dismissed Konop's SCA claim, and he appealed to the Ninth Circuit Court of Appeals. The amendment of the SCA by the USA PATRIOT Act, among other factors, caused a panel of the Ninth Circuit to withdraw its original opinion finding in favor of Konop on the SCA claim and issue a new opinion affirming the trial court's summary judgment against Konop on that claim. The court pointed to Congress's intent to reduce the protection provided to voice mail so that it would have the same form of protection as other forms of electronic communications.⁸⁶ The change in law also meant that Konop's anti-employer, anti-union communications could legally be intercepted if they were in electronic storage, rather than in electronic transit. The upshot of the *Konop* case is that any federal claims that employees might have had for violation of the privacy of their electronic association activities are now more difficult after the PATRIOT Act.

Private employers are using the threat of terrorism as a reason to increase monitoring of worker activity, which may chill the exercise of freedom of association in the workplace.⁸⁷ As one commentator put it, "[a] variety of indirect effects on unions and bargaining may also arise" in the airline industry, particularly from the greater tensions imposed by government mandates such as background checks, self-defense and passenger threat assessment.⁸⁸

The USA PATRIOT Act has created an environment in which it is acceptable to reduce rights in the name of national security. Employers

meeting is surveillance in violation of § 8(a)(1)); *Huck Store Fixture Co.*, 334 N.L.R.B. 119, 128 (2001) (holding that giving the impression that employees' attendance at union meetings would be under surveillance was a violation of section 8(a)(1)).

84. 18 U.S.C. §§ 2701–2712 (Supp. 2001).

85. 302 F.3d 868 (9th Cir. 2002).

86. *Id.* at 878.

87. Michael L. Triplett, *As Employee Monitoring Expands, Attention Turns to Information, Policies*, Daily Lab. Rep. (BNA), Mar. 10, 2005, at C2.

88. John Delaney, *Contemporary Developments in and Challenges to Collective Bargaining in the United States*, in INTERNATIONAL HANDBOOK OF TRADE UNIONS 502, 524 (John T. Addison & Claus Schnabel eds., 2003).

may feel that surveillance cameras and even global positioning system tracking is necessary to respond to the threat of terrorism. This may lead to unlawful surveillance under the NLRA, improperly justified by "national security." Recent cases at the NLRB, discussed in Part IV below, suggest that this argument may carry a great deal of weight with the current NLRB. In addition, as rights for one group are limited, it is easier to legitimize a retrenchment of rights for other groups. The following sections will show how the Executive Branch and Congress's War on Terror has led to a War on Workers.

B. West Coast Port Dispute: Limitations on the Right to Bargain

The Taft-Hartley Act of 1947 gives the President authority to end a strike or lockout if it "will imperil the national health or safety."⁸⁹ Though the courts usually defer to the government on what constitutes a threat to "national health and safety," the government has not always successfully made that showing. For example, in 1978, President Jimmy Carter invoked Taft-Hartley's provisions to obtain a temporary restraining order against a strike in the coal mines in the midst of the energy crisis, but the injunction was dissolved eight days later after the district court found that the risk to the nation's health and safety was not grave enough to justify issuance of the permanent injunction.⁹⁰

Despite the Carter administration's failure to obtain an injunction, courts have consistently deferred to the judgment of the Executive Branch in obtaining injunctions under the Act in construing the terms "national health" and "safety."⁹¹ For example, in *U.S. v. Portland Longshoremen's Benevolent Society, Local No. 861*, the court held that "national health" meant economic health, which included effects on employment, on the nation's balance of payments, or on the delivery of food.⁹² A report by the

89. 29 U.S.C. § 178(a)(ii) (2000). The Railway Labor Act, which applies to railroads and airlines, has emergency procedures that require the President to show only that the labor dispute will "threaten substantially to interrupt interstate commerce." 45 U.S.C. § 160 (2000).

90. Jeanne Cummings, *U.S. Judge Swiftly Orders End to Lockout at U.S. Ports*, WALL ST. J., Oct. 9, 2002, at A1.

91. See National Administrative Office Report, *Emergency Procedures for Resolving Labor-Management Disputes in the United States, Canada and Mexico* (Sept. 2000), available at <http://www.dol.gov/ilab/media/reports/nao/EmergencyProcedures.htm> [hereinafter NAO Report] (discussing the laws and procedures in the United States, Canada, and Mexico that are utilized in the event of special emergencies or extraordinary circumstances associated with labor disputes); see also Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63 (2001) (exploring the decline of workers' collective actions over the past sixty-five years).

92. 336 F. Supp. 504 (D. Me. 1971) (holding a maritime strike as a threat to national

National Administrative Office states that the courts' conception of national safety has included activities that affect, delay, or inconvenience the military, NASA, the Atomic Energy Commission, or NATO allies and other security groups.⁹³ Thus, the government need not wait until national health or safety is actually impaired for an injunction to issue; the fact that the national health or safety would be or could be affected has been enough for many courts.⁹⁴

After 9/11, the Bush administration expanded the interpretation of "national health and safety" to include the War on Terror. The 2002 contract negotiations between shipping companies and the International Longshore and Warehouseworkers Union (ILWU) focused on technological changes that threatened the job security of ILWU members. The dispute festered to a stalemate, with both sides unable to reach an agreement for weeks. Ultimately, it resulted in a lockout, which led to boats stacking up on loading docks while perishable goods were spoiling.

On October 9, 2002, President Bush used the emergency powers of the Taft-Hartley Act to send the longshore workers back to work. In seeking an injunction from the federal court in San Francisco, the administration leaned heavily on its characterization of the nation being in the middle of war, stating: "[A]n extended shutdown of the West Coast ports would have a substantial negative impact on the military's readiness during a time of national crisis."⁹⁵ In an October 7, 2002 statement, Secretary of Labor Elaine Chao also said that the shutdown would have grave effects on the nation's military operations:

The shutdown . . . has serious consequences for our national defense. America's military relies on commercial ships, docking at West Coast ports, to supply our armed forces. Any disruption in the flow of these military shipments could significantly impact the Defense Department's ability to support our men and women in harm's way.⁹⁶

health). See also *United States v. Int'l Longshoremen's Ass'n*, 293 F. Supp. 97 (S.D.N.Y. 1968) (discussing the term "national health"); NAO Report, *supra* note 91.

93. NAO Report, *supra* note 91.

94. See *United States v. Int'l Longshoremen's Ass'n*, AFL-CIO, 246 F. Supp. 849 (S.D.N.Y. 1964) (granting preliminary injunction against maritime strike because national health or safety could be imperiled).

95. Memorandum of Points and Authorities in Support of Plaintiff's Ex Parte Motion for a Temporary Restraining Order and Preliminary Injunction, *United States v. Pac. Mar. Ass'n* (Oct. 8, 2002), available at <http://news.findlaw.com/hdocs/docs/ilwu/uspmailwu10902gbrf.pdf>.

96. Press Statement, U.S. Dept. of Labor, Statement by U.S. Secretary Elaine L. Chao on Presidential Action on the West Coast Ports Dispute (Oct. 7, 2002), available at <http://www.dol.gov/opa/media/press/opa/OPA2002576.htm>.

At the time, the war in Iraq had not yet begun, and major fighting in Afghanistan had ceased months earlier. Nevertheless, Secretary of Defense Donald Rumsfeld, in his declaration filed in support of the injunction, averred that the dispute “jeopardize[s] the defense effort and the Global War on Terrorism.”⁹⁷

The district court granted the government’s request for an injunction, finding that the government had met its burden of showing a threat to national health and safety.⁹⁸ This was in spite of the fact that the ILWU and the association representing the shipping companies, the Pacific Maritime Association (PMA), had reached an agreement to load essential military cargo during the labor dispute. In his written order granting the preliminary injunction, United States District Judge William Alsup dismissed this agreement as a way of preserving military readiness, finding that it was too difficult to determine and segregate essential military cargo.⁹⁹ In addition to rejecting the creative solution that the parties reached with regard to essential military cargo, the court *sua sponte* extended the injunction to include “any future strike or other work slowdowns by a union,” even though it was the shippers who first locked out the union.¹⁰⁰ “In short,” Judge Alsup stated, “at a time when our nation is at war with international terrorists and when our national defense system must be fully prepared, the sustained closure of West Coast ports would imperil the national safety.”¹⁰¹

Seen in the broader economic and political context, the government’s interest in ending the port dispute was not solely driven by concerns over national security and national safety—the United States faces a massive trade deficit and technological changes at the ports could help reduce labor costs and increase productivity and profits. These underlying economic reasons were likely the main motivators behind the government’s actions. However, terrorism concerns were the primary way to legitimize the action and gain public support. The West Coast port dispute shows how the retrenchment of rights theory intertwines many complex factors to justify

97. Memorandum of Points and Authorities, *supra* note 95 (quoting Declaration of Donald H. Rumsfeld ¶ 4). In paragraph three of his declaration, Secretary Rumsfeld admitted that the military was more dependent than ever on commercial shipping because it no longer kept large inventories of its own but depended on “just-in-time” deliveries from commercial suppliers.

98. *United States v. Pac. Mar. Ass’n*, 229 F. Supp. 2d 1008, 1015 (N.D. Cal. 2002)

99. *Id.* at 1014.

100. *Id.* at 1015. The injunction was the first to apply the emergency powers to a lockout, though the shippers argued that the lockout was occasioned by the union’s slowdown. See ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 501 (2d ed. 2004) (discussing court cases regarding the employers’ duty to bargain).

101. *Pac. Mar. Ass’n*, 229 F. Supp. 2d at 1014–15.

restrictions on labor rights.

Six weeks after the judge's injunction opened the ports, the union and the shippers reached an agreement. The union won some concessions on pay and pensions for the dockworkers but generally gave management a free hand to implement technological changes. Although the labor dispute ended quickly, thanks to the Taft-Hartley injunction, whether or not the injunction should have been granted at all remains open to debate. What seems clear is that the Bush administration will use the War on Terror as a justification for "national health and safety" injunctions, even when there is no war being actively waged in foreign lands.

C. Airport Screeners Struggle for the Right to Bargain

After 9/11, the U.S. government scrambled to reorganize to meet the challenges posed by the threat of international terrorism. Many placed the blame for allowing hijackers through security with box-cutters on the system of privately-contracted security. Before 9/11, airports usually did not hire their own workers to screen passengers and luggage. Instead, their contractors hired workers at low wages, which caused low morale and attracted a large number of noncitizens. However, in the years before 9/11, some airport screeners had seen recent improvements in their working conditions. Organized labor had made some airports, such as Los Angeles International Airport, the target of organizing and living wage campaigns.¹⁰² Many of these workers had been organized by the Service Employees International Union (SEIU), known for its innovative "Justice for Janitors" campaigns.¹⁰³

In response to the intense scrutiny of airport security workers, Congress passed the Aviation and Transportation Security Act of 2001 ("Security Act"), which placed the responsibility for airport security under a new federal agency called the Transportation Security Administration (TSA).¹⁰⁴ The TSA became part of the Department of Homeland Security (DHS), which was created in 2002.¹⁰⁵ The DHS also included the Bureau

102. Jim Newton & Tracy Johnson, *Union Rally Seeks Higher Pay for Airport Workers*, L.A. TIMES, Mar. 28, 1998, at B1 (recounting the union officials' argument that paying security personnel more ensures passenger safety); John Seeley, *Flying High: More Money for Airport Workers*, L.A. WEEKLY, Dec. 22-28, 2000 (describing approval of LAX workers' landmark three-year contract), available at <http://www.laweekly.com/ink/01/05/news-seeley.php>.

103. Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199 (Ruth Milkman ed., 2000).

104. Aviation and Transportation Security Act of 2001 (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001).

105. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

of Immigrations and Customs Enforcement (ICE), whose goals were controlling borders, responding to emergencies, processing immigration applications and communicating threat information.¹⁰⁶

This new structure requires all airport security screeners to be federal employees, which means they must be U.S. citizens or nationals. This also limits the airport screeners' ability to strike because the screeners can only join a federal union, which does not have the same ability to strike as private sector unions. Notwithstanding the slim possibility of an illegal strike, federal control of airport screening essentially means that a militant private sector union like SEIU will not represent airport workers. Thus, the possibility for innovative private sector organizing has been curtailed by the federal takeover of airport security.

The ability of TSA workers to join any union is still in doubt because the Bush administration moved to exclude them from collective bargaining. Section 7112(b)(6) of the Federal Service Labor-Management Relations Act (FSLMRA) allows agencies to exclude individual workers from bargaining units on national security grounds.¹⁰⁷ James Loy, Under Secretary of the Transportation Security Agency, issued a directive stating that federally employed security screeners "shall not . . . be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization."¹⁰⁸

Airport security workers in the TSA have taken their claims to the Federal Labor Relations Authority and the federal courts but have so far been rebuffed.¹⁰⁹ Shortly after the TSA was established, the American Federation of Government Employees (AFGE) applied to the Federal Labor Relations Authority (FLRA) to be the exclusive bargaining representative of the TSA airport screeners. The FLRA held that union representation of TSA screeners was foreclosed by: (1) section 111(d) of the Security Act, which provides that "[n]otwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for [federally employed security screeners]";¹¹⁰ and (2) the directive written by Loy, which stated that the screeners "shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose

106. See MACK & KELLY, *supra* note 69, at 169 (describing the responsibilities of the newly created DHS).

107. 5 U.S.C. § 7112(b)(6) (2000).

108. AFGE v. Loy, 367 F.3d 932, 934 (D.C. Cir. 2004).

109. *Id.* See *Washington in Brief: Union Loses Ruling on Airport Screeners*, WASH. POST, Sept. 6, 2003, at A04 (describing the rejection by a federal court of a claim by a federal employees' union for the right to join unions).

110. Aviation and Transportation Security Act of 2001 (ATSA), Pub. L. No. 107-71, 115 Stat. 597, 620 (2001).

of engaging in such bargaining by any representative or organization.”¹¹¹

AFGE appealed the decision of the FLRA to the federal district court and included a constitutional claim. The District Court for the District of Columbia dismissed both claims.¹¹² The election decision was dismissed because the court found that it was a decision that may only be reviewed by a court of appeals. The constitutional claim was dismissed because the court held that it lacked jurisdiction, though the court did ultimately render an opinion rejecting the constitutional claims because neither the First nor the Fifth Amendment to the U.S. Constitution gave the screeners the right to bargain with the government. The D.C. Circuit Court of Appeals affirmed on both grounds, holding that the FLRA decision was not properly appealed to the district court and that the district court lacked jurisdiction because the constitutional issues were not properly raised with the FLRA.¹¹³ With the prospects for relief in Congress and the courts nearly exhausted, AFGE has a complaint pending with the International Labor Organization, arguing that the exclusion from collective bargaining violates international principles of freedom of association.¹¹⁴

D. A New Face for Federal Personnel Systems

Regardless of whether employees are in security-sensitive positions or not, the government has come to view any collective bargaining as in conflict with national security. The Bush administration has made the freedom to hire and fire at will a national security priority. As such, the administration sought to eliminate collective bargaining from DHS as part of the authorizing legislation, but labor's allies in Congress thwarted the administration's efforts for several months in 2002. It was not until November 2002, after Republicans gained majorities in both houses of Congress, that the DHS statute finally passed.¹¹⁵ In the end, the legislation

111. *Loy*, 367 F.3d at 934.

112. *AFGE v. Loy*, 281 F. Supp. 2d 59, 66 (D.D.C. 2003).

113. 367 F.3d at 934.

114. Press Release, American Federation of Government Employees, AFL-CIO, In an International Forum, AFGE Charges Bush Administration with Violations of International Labor Law (Aug. 14, 2003), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=270>.

115. See Taryn M. Byrne & Gary L. Tomasulo, *Executive Power, National Security & Federal Employee Collective Bargaining Rights: The New Department of Homeland Security*, 21 HOFSTRA LAB. & EMP. L.J. 293, 295 (2003) (explaining how the impasse over the national security exemption was overcome once Senate Republicans gained majority control in 2002); Michael Hayes, *Improving Security Through Reducing Employee Rights*, 10 IUS GENTIUM 49 (2004), available at http://law.ubalt.edu/cicl/ilt/IU10_2004.pdf (describing the much broader authority given to the President under the Homeland Security Act to waive collective bargaining rights of federal employees); Joseph Slater, *Homeland Security vs. Workers Rights? What the Federal Government Should Learn From History*

gave authority to the Secretary of Homeland Security and the Director of the Office of Personnel Management to establish a new human resources management system within DHS, including the authority to waive or modify the existing labor relations system.¹¹⁶

There are certain justifiable limits on collective bargaining and freedom of association for some government workers. For example, police officers, military personnel, and fire fighters are denied the right to strike as a matter of public safety.¹¹⁷ In addition, the President has long had the authority to remove the right to union representation if the President determines that: (1) the employees work for an entity with the primary function of intelligence, investigative, or national security work; and (2) representation rights cannot be applied in a manner consistent with national security.¹¹⁸

However, the new Homeland Security Act frees the President from the stricture of the two-part test above if the President decides that the suspension of bargaining rights is “necessary in the interest of national security.”¹¹⁹ This would potentially deny collective bargaining rights to all of the employees of DHS, from the clerical employees up to the Secretary of Homeland Security.¹²⁰ The administration has used the rubric of national security to get “flexibility,” even though there is no evidence that managerial flexibility promotes national security.

DHS employees were not the only government workers to have their collective bargaining rights threatened. Workers at the National Imagery and Mapping Agency (NIMA) were told that their union was inconsistent with national security. NIMA, created from eight defense and intelligence agencies in 1996, employs cartographers, digital imaging specialists, data management specialists, and others. The administration believes NIMA has evolved into full-time intelligence work directly affecting national

and Experience, and Why, 6 U. PA. J. LAB. & EMP. L. 295, 309 (2004) (discussing the political haggling over the President’s powers in the proposed legislation).

116. See 5 U.S.C. § 9701(a) (2000) (authorizing notification of the existing labor relations system).

117. JOSEPH R. GRODIN, JUNE WEISBERGER & MARTIN H. MALIN, *PUBLIC SECTOR EMPLOYMENT* 82–83 (2004).

118. 5 U.S.C. § 7103(b)(1) (2000).

119. 5 U.S.C. § 7103(b)(2) (2000).

120. See Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, U. ILL. L. REV. 245, 261 (1985) (discussing the ideology of strikes as disloyal, traitorous rebellions); see also JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW AND THE STATE, 1900–1962* 37 (2004) (providing newspaper accounts of a 1919 Boston police strike described as a “revolt”); Slater, *supra* note 115 (discussing the denial of collective bargaining rights for federal employees); Molly Selzer, *Federalization of Airport Security Workers: A Study of the Practical Impact of the Aviation and Transportation Security Act from a Labor Law Perspective*, 5 U. PA. J. LAB. & EMP. L. 363 (2003) (discussing the denial of bargaining rights for federal airport security workers).

security.¹²¹ The Bush administration also studied the Departments of Defense and Justice to determine whether or not national security was consistent with collective bargaining. In November 2003, Congress granted Defense Secretary Rumsfeld the authority to establish the National Security Personnel System (NSPS) at the Department of Defense (DOD).¹²² This legislation gave the DOD the authority to promulgate regulations to provide greater authority over civilian employees in the defense department in order to "strike back at terrorists."¹²³ The authority to promulgate regulations implementing the new "streamlined" personnel system at the DOD caused concern among leaders of unions who believe that the department leader's ultimate goal is to eliminate unions entirely.¹²⁴

The efforts to reform the federal personnel system to fight the War on Terror culminated in new regulations for the DHS and the DOD in the spring of 2005. Final regulations articulating the new personnel system for DHS, as well as proposed regulations for DOD, were released in February 2005. The new DHS personnel policies significantly limit a DHS employee's freedom of association. The regulations begin by sounding a theme of national sacrifice:

Since September 11, 2001, this Nation has come together with a unity of purpose that has not been seen or felt since the attack at Pearl Harbor in 1941. Out of that national tragedy emerged a consensus for a comprehensive global war on terrorism. That consensus resulted in the enactment of legislation creating the Department of Homeland Security, and with it, the authority to create a system for managing its human resources that would be flexible and mission-focused without compromising the principles of merit and fitness.¹²⁵

In order to fulfill its mission, the new system is intended to "provide for greater flexibility and accountability in the way employees are paid, developed, evaluated, afforded due process, and represented by labor

121. Stephen Barr, *National Security Concerns Wipe Out Union Rights at Mapping Agency*, WASH. POST, Feb. 10, 2003, at B2.

122. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101, 117 Stat. 1392, 1401 (2003).

123. Christopher Lee, *Rumsfeld Gains Latitude on Rules for Civilian Workers*, WASH. POST, Nov. 8, 2003, at A3.

124. See Stephen Barr, *Unions Ask Help of Congress on Pentagon's New Civil Service System*, WASH. POST, Mar. 3, 2004, at B2 ("I don't use the term loosely—it is union busting. They don't want unions anymore in the Department of Defense." (quoting Gregory Junemann, president of the International Federation of Professional and Technical Engineers)).

125. Department of Homeland Security Human Resources Management System [hereinafter DHS HRMS], 70 Fed. Reg. 5272, 5273 (Feb. 1, 2005) (to be codified at 5 C.F.R. pt. 9701).

organizations.”¹²⁶ In a society that is increasingly suspicious of noncitizens, the regulations more closely circumscribe noncitizen worker rights. For one, noncitizens are excluded from collective bargaining.¹²⁷ Additionally, noncitizens are excluded from typical civil service protections against adverse disciplinary actions.¹²⁸

Most decisions of the DHS Secretary take effect immediately, with bargaining issues resolved only after the decision is reached. Many policies and procedures will be established through implementing directives, which are not subject to bargaining but which must be accorded the force and effect of the law. Several review boards consisting of members appointed by the DHS Secretary are established to preside over issues previously handled by the Federal Labor Relations Authority and the Merit Systems Protection Board. Unfair labor practice charges may only be filed if they cannot be handled through the Department’s appeals process.

The right to bargain, and the free exchange of information that makes bargaining meaningful, is also limited by the DHS regulations. Employees engaged in intelligence, investigative, or security work that “directly affects national security” may not be included in any bargaining unit. DHS has broad discretion in determining what information must be shared with the labor organizations when requested. The justification for the increased regulation of civilian employees, like so much other rhetoric since 9/11, is placed in militaristic terms:

Department managers, supervisors, and employees are on the frontlines of the war on terrorism and the efforts to preserve homeland security. The Department must be able to rely on the judgment and ability of these managers and supervisors to make day-to-day decisions—even if this means deviating from established or negotiated procedures. The reality in the Department today is that such deviations would be constant, thereby rendering any negotiated procedures meaningless. Moreover, the Department’s managers and supervisors must be able to make split-second decisions to deal with operational realities free of arbitrarily imposed standards.¹²⁹

While the proposed regulations for the DOD drew from the newly enacted regulations for DHS, the DOD regulations go further. The decision to negotiate with a union above the level of exclusive recognition rests with the Secretary and is not subject to review or statutory dispute resolution procedures. While unions may request to negotiate at a level above

126. *Id.*

127. DHS HRMS, *supra* note 125, at 5333.

128. *Id.* at 5342.

129. *Id.* at 5279.

recognition, the Department has sole and exclusive discretion to grant the labor organization's requests.¹³⁰ Unions representing Department of Defense workers brought a lawsuit against the government alleging that the implementation of the new personnel system should have been negotiated.¹³¹ While a federal judge in the District of Columbia recently opined during a hearing that the government should have negotiated the changes with the affected unions, the changes were implemented in October 2005.¹³²

Despite what seem to be naked attempts by the government to assert its power as employer, the regulations make it clear that the Bush administration sees the new paradigm as non-negotiable: "The attacks of September 11 made it clear that flexibility is not a policy preference. It is nothing less than an absolute requirement and it must become the foundation of DOD civilian human resources management."¹³³ However, President Bush began to implement many of his policies before the 9/11 attacks in February 2001, with a report by the conservative Heritage Foundation as the blueprint.¹³⁴ The report, entitled *Taking Charge of Federal Personnel*, was released on January 10, 2001 and argued for the end of labor management relationships that President Clinton had created through Executive Order 12,871.¹³⁵ On February 17, 2001, President George W. Bush repealed Executive Order 12,871, ending the mandatory labor management partnerships that had been created by Clinton. The executive orders revoking union rights came in rapid succession after 9/11—taking away the right to bargain from clerical employees in certain U.S. Attorneys' offices, removing air traffic control from the list of "inherently governmental functions" not subject to privatization, and

130. National Security Personnel System (NSPS), 70 Fed. Reg. 7552, 7572 (Feb. 14, 2005) (to be codified at 5 C.F.R. pt. 9901).

131. See Jane M. Von Bergen, *Ten Unions Sue Rumsfeld, Allege Talks Weren't Held*, PHILADELPHIA INQUIRER, Feb. 24, 2005, at C1 (describing the lawsuit brought by ten labor unions representing 300,000 civilian employees challenging the refusal to negotiate the National Security Personnel System).

132. Louis C. LaBrecque, *DOD Unveils Final Personnel System Rule Covering 650,000 Workers; Unions Plan Suit*, Daily Lab. Rep. (BNA), Oct. 28, 2005, at A-8. A coalition of unions from the Department of Defense filed suit on November 7, 2005. See United Department of Defense Workers Coalition Home Page, <http://www.uniteddodworkerscoalition.org> (announcing suit filed to block NSPS).

133. NSPS, 70 Fed. Reg. at 7553.

134. See Martin H. Malin, *Public Sector Labor Law Doctrine and Labor-Management Cooperation*, in GOING PUBLIC: THE ROLE OF LABOR-MANAGEMENT RELATIONS IN DELIVERING QUALITY GOVERNMENT SERVICES 267, 277–78 (Jonathan Brock & David B. Lipsky eds., 2003) (discussing a Heritage Foundation report urging President Bush to create a command and control approach to personnel management).

135. George Nesterzuk et al., *Taking Charge of Federal Personnel*, HERITAGE FOUNDATION BACKGROUNDER, No. 1404, Jan. 10, 2001, available at <http://www.heritage.org/Research/GovernmentReform/BG1404.cfm>.

starting the battle over collective bargaining in the Department of Homeland Security.¹³⁶

These efforts to limit federal workers' freedom of association in the name of national security aptly illustrate the theoretical concepts in this Article. These limitations on workers' rights are another step in the retrenchment of rights resulting from 9/11. The events of 9/11 and the War on Terror are used rhetorically as direct reasons for the limitations imposed by the new and proposed regulations. Of course, the Bush administration might have favored limiting collective bargaining rights for federal workers in the absence of the War on Terror. The events of 9/11 merely provide a convenient pretext for the new rules, as does rhetoric that connects union activities with national instability.

E. The Rhetorical Move: Collective Bargaining and Terrorism

Language is a powerful way of shaping attitudes in the post-9/11 era.¹³⁷ Besides claiming that collective bargaining was inconsistent with national security, the rhetoric of many government officials since 9/11 has equated collective bargaining with terrorism in much the same way that private employers have equated unions with terrorists in the past.¹³⁸ Government officials historically have also made connections between terrorism and collective bargaining demands. These connections have best served employer purposes at times of national insecurity brought on by national crises like the Iran hostage crisis and 9/11.

Terrorism took center stage in late 1979 when sixty-six Americans were held hostage at the U.S. Embassy in Iran. Although President Carter's administration worked for the release of the hostages during his term, they were not freed until President Reagan took office on January 20,

136. See Exec. Order No. 13,252, 67 Fed. Reg. 1601 (Jan. 7, 2002) (prohibiting collective bargaining in five subdivisions of the Department of Justice: the criminal division of the Department, the U.S. Attorneys' offices, the National Drug Intelligence Center, INTERPOL, and the Office of Intelligence Policy and Review); Exec. Order No. 13,189, 66 Fed. Reg. 5421 (Jan. 19, 2001); Malin, *supra* note 134, at 278 (explaining how the order stripped certain employees of their collective bargaining rights).

137. See CHRISTOPHER R. MARTIN, FRAMED! LABOR AND THE CORPORATE MEDIA 16 (Cornell University Press 2004) (describing how the media vilified the PATCO strike); GEOFFREY NUNBERG, GOING NUCLEAR: LANGUAGE, POLITICS AND CULTURE IN CONFRONTATIONAL TIMES (Public Affairs 2004) (explaining how language is used to evoke emotions in times of war); Amy Kaplan, *Homeland Insecurities: Transformation of Language and Space*, in SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 55 (Mary L. Dudziak ed., 2003) (describing new words that have entered the vocabulary since 9/11).

138. See, e.g., *Am. Meat Packing Corp.*, 301 N.L.R.B. 835 (1991) (accusing the union of "terrorism"); *Loose Leaf Hardware, Inc.*, 267 N.L.R.B. 619 (1983) (showing an employer discredited unionization as "tyranny backed by terrorism"); *Moore-Lowery Flour Mills Co.*, 21 N.L.R.B. 1040 (1940) (claiming the union was engaging in "mad-dog terrorism").

1981. The national vulnerability shown by the hostage crisis led the Reagan Administration to draw a hard line in the Cold War with alleged terrorists. In a speech welcoming the hostages back to the United States on January 27, 1981, President Reagan declared his administration's approach to dealing with terrorists:

Let terrorists be aware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution. We hear it said that we live in an era of limit to our powers. Well, let it also be understood, there are limits to our patience.¹³⁹

A few months later, it was clear that the Reagan administration's hard line stance was not limited to terrorists. Soon after the release of the hostages, negotiations between the federal government and the Professional Air Traffic Controllers Organization (PATCO) simmered, eventually boiling over on June 22, 1981 when 95.3% of PATCO's members rejected the Federal Aviation Administration's final offer.¹⁴⁰ A strike deadline was set for 7 a.m. on August 3, 1981, despite the common knowledge among the workers and organizers that the strike would be illegal.¹⁴¹

When the strike began as planned on August 3, the President warned that anyone not reporting to work within forty-eight hours would be fired. The Iran crisis was fresh in everyone's mind as the administration promised that it would not be held hostage by unreasonable demands.¹⁴² This sentiment was explicitly stated in some of the numerous judicial opinions that came out of the strike. In one case, the judicial opinion stated, "The scheme of the strike was that the convenience of the nation's 265 million citizens would be held hostage to the Union's demands."¹⁴³

139. President Ronald Reagan, Remarks at the Welcoming Ceremony for the Freed American Hostages (Jan. 27, 1981), <http://www.reagan.utexas.edu/archives/speeches/1981/12781b.htm>.

140. Herbert R. Northrup, *The Rise and Demise of PATCO, in PUBLIC SECTOR LABOR RELATIONS: ANALYSIS AND READINGS* 240, 251 (David Lewin et al. eds., 1977).

141. The illegality of the strike was certainly one of the factors contributing to the lack of support PATCO received from other unions. Others have argued, however, that labor's unwillingness to engage in such "civil disobedience" is one of the major reasons for the decline of the labor movement. See STANLEY ARONOWITZ, *FROM THE ASHES OF THE OLD: AMERICAN LABOR AND AMERICA'S FUTURE* 82 (1998) (arguing that the failure of the PATCO strike led public employee unions in the 1980's to seek accommodation with Republican administrations).

142. See Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 763 (1983) (describing the strong backlash against lawbreakers that resulted from the Iranian hostage crisis); see also ART SHOSTAK & DAVE SKOCIK, *THE AIR TRAFFIC CONTROLLERS' CONTROVERSY: LESSONS FROM THE PATCO STRIKE* (Human Science Press 1986) (describing Reagan's hostility towards the PATCO leaders).

143. *PATCO v. Fed. Labor Relations Auth.*, 685 F.2d 547, 622 (D.C. Cir. 1982) (MacKinnon, J., concurring).

Despite having little support from the public or the rest of the labor movement, a large number of traffic controllers refused to return to work. These workers were fired but were eventually given the right of re-employment in other federal jobs. The union, on the other hand, did not survive.¹⁴⁴ While there is certainly room to question the wisdom of the union's strategy, the administration's hard line stance was facilitated by the nation's recent experience with the hostage crisis. The administration failed to realize, however, that simply extending collective bargaining rights to public employees does not necessarily lead to more strikes.¹⁴⁵

Even when public employees have engaged in legal strikes, their demands have been seen as disloyal during periods of national insecurity. When government employees in Minnesota decided to go on strike in the months following 9/11, they were called unpatriotic and selfish.¹⁴⁶ In addition, when the National Education Association leveled criticism against the Bush Administration's No Child Left Behind Act in February 2004, the Secretary of Education called the nation's largest teachers' union a "terrorist organization."¹⁴⁷

Recently, lawmakers even made a connection between "weapons of mass destruction" and private sector union organizers in a hearing about the practice of "salting." Salting is the practice of union organizers applying for jobs with the intention of organizing the employees of the company. In *NLRB v. Town & Country Electric, Inc.*, the U.S. Supreme Court held that union organizers who suffer retaliation for salting are protected by the NLRA just like any other employee.¹⁴⁸ Due to the Supreme Court's decision protecting the practice and the increasing use of salting by unions

144. See Nelson Lichtenstein, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (Princeton University Press 2002) (demonstrating the spectacular destruction of PATCO by the Reagan administration).

145. Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313 (1993) (studying the 1984 laws giving the right to strike to government workers in Illinois and Ohio).

146. Steven Greenhouse, *Some Workers Are Finding It a Difficult Time to Strike*, N.Y. TIMES, Oct. 5, 2001, at A22; Bill Salisbury, *War Threat May Avert Strike: Concerns that Seemed Weighty Pale Against Terrorist Attack on U.S.*, ST. PAUL PIONEER PRESS, Sept. 23, 2001, at C1.

147. See Nick Anderson, *Paige Calls Teachers Union a "Terrorist Organization,"* L.A. TIMES, Feb. 24, 2004, at A15 ("Education Secretary Rod Paige lashed out at the nation's largest teacher's union, calling the 2.7 million-member National Education Assn. a 'terrorist organization.'"); Sam Dillon & Diana Jean Schemo, *Union Urges Bush to Replace Education Chief Over Remark*, N.Y. TIMES, Feb. 25, 2004, at A15; Michele Jacklin, *Who's Afraid of the Teachers Union?*, THE HARTFORD COURANT, Mar. 3, 2004, at A13 ("U.S. Education Secretary called the union representing teachers a 'terrorist organization.'"); Bob Leonard, *Forget bin Laden; Get the Teachers*, LEXINGTON HERALD LEADER, Mar. 1, 2004, at A11 ("National Education Secretary called the nation's largest teachers union, NEA, a terrorist organization.").

148. 516 U.S. 85 (1995).

that are denied other access to employees, the Congressional Subcommittee on Workforce, Empowerment, and Government Programs of the Small Business Committee held hearings on salting in June 2005. At the hearing, Iowa Republican Steve King, who co-sponsored a bill called the Truth in Employment Act, called salting "an economic weapon of mass destruction."¹⁴⁹ King also called salting "immoral" and "a subversive tactic."¹⁵⁰

These rhetorical flourishes, whether used by government employers, politicians, or private employers, are likely to further the connections between unions and terrorism and validate the denial of freedom of association and collective bargaining. The fact that many immigrants are active in unions today, and that unions are one of the primary forums for association in the United States, will lead to more suspicion for unions in the post-9/11 era.¹⁵¹ Further, the notion of strikes being traitorous, disloyal rebellions is further cemented in the minds of the public.¹⁵² Such rhetoric makes it easier to justify the denial of labor's freedom of association.¹⁵³

The foregoing part shows that presidential and congressional actions since 9/11 have limited labor's freedom of association. These moves might have occurred absent 9/11, but the terrorist attacks gave a new justification for these limitations. The rhetoric connecting collective bargaining with terrorism served to further cement in the public mind the connection between domestic instability and strikes, demonstrations and picketing. This connection has also surfaced in the way that judges and administrative decision-makers have reached and justified labor law decisions since 9/11.

149. *Rep. King Says His Anti-Salting Bill Would Combat Unfair Economic Weapon*, Daily Lab. Rep. (BNA), June 22, 2005, at A-12.

150. *Id.*

151. See Leti Volpp, *The Citizen and the Terrorist*, in *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 147 (Mary L. Dudziak ed., 2003) (detailing the increase of hate crimes after 9/11).

152. See Fox, *supra* note 120 (illustrating how strikes are perceived as evil); see also Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1757 (2004) (describing how the perception of a disloyal worker in the public's mind is an obstacle to union goals).

153. The rhetoric surrounding the recent passage of the Central American Free Trade Agreement (CAFTA) also leaned heavily on national security. The view that CAFTA was crucial to national security may have tipped the balance toward passage in the 217-to-215 House of Representatives vote. Jim Abrams, *In Bush Win, House Narrowly Approves CAFTA*, Associated Press, July 28, 2005, available at WESTLAW, Westlaw Directory, APNEWS database ("In the end, it was the national security argument—that rejection of the deal would further impoverish the region, undermine their democracies and exacerbate the flow of illegal immigrants into the United States—that appeared to persuade some wavering members.").

IV. THE EFFECTS OF 9/11 ON LABOR LAW ADJUDICATION

Not all of the effects on labor's freedom of association since 9/11 have been a result of direct actions by Congress and the Executive Branch. The government also acts as an adjudicator and a contractor with private employers. The uncertain times of the post 9/11 period have left their imprint on legal decisions, with the War on Terror being used as a justification for decisions that weaken labor's freedom of association. The legal remedies available to the National Labor Relations Board when it prosecutes unfair labor practices against immigrant workers were considerably weakened by the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* in the months after 9/11.¹⁵⁴ If immigrant workers are deterred from the exercise of federal labor law, freedom of association for all workers also will be chilled.

A. *The U.S. Supreme Court's Hoffman Decision and its Effects on Immigrant Workers*

The 9/11 attacks have affected immigrant workers in many ways, including increased border enforcement making it difficult for authorized workers to get across borders.¹⁵⁵ Another immediate impact of the attacks was the scuttling of talks between the United States and Mexico for a possible amnesty or guestworker program, though activity in that regard has recently increased.¹⁵⁶ Immigration has been linked in the public mind to terrorism, and both the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Antiterrorism and Effective Death Penalty Act contained several provisions that targeted immigrants.¹⁵⁷ The

154. 535 U.S. 137 (2002).

155. See David Bacon, *After 9/11, Immigrant Workers in the Crosshairs*, Dec. 15, 2002, <http://dbacon.igc.org/Imigrants/15WrkrsInCrosshairs.htm> (criticizing the government for placing the blame on immigrant workers for 9/11); David Bacon, *Casualties of "Security": One Year of War on Immigrant Workers*, http://www.americas.org/item_95 (chronicling the hardships of immigrant workers as the United States government cracks down on all types of immigrant labor) (last visited Jan. 15, 2006); see also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 51 (Harvard University Press 2005) (pointing to the 9/11 attacks and the Hoffman decision as the twin major events affecting immigrant worker rights).

156. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004) (describing the United States' tendency to view nonimmigrant workers as threatening and loyal to their home country); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002) (explaining the legality of using "Mexican appearance" as one factor "in the decision to stop moving vehicles and to check the immigration status of their occupants").

157. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (codified as amended at 8 U.S.C. § 1189 (1996)).

suspicion of immigrants has led to a climate of fear that might result in lower levels of immigrant participation in associations and unions post-9/11. If immigrants fear being active in their workplace, labor's freedom of association might be compromised. Some of the most direct effects on immigrants' freedom of association are a result of the Supreme Court's 2002 *Hoffman* decision.

In the 1935 legislative findings of the National Labor Relations Act, Congress recognized that individual working people could only obtain bargaining power in association with other workers. Congress sought to "[e]ncourage the practice and procedure of collective bargaining and . . . the exercise by workers of full freedom of association."¹⁵⁸ Employee status, broadly and circularly defined as "any employee" who is not excluded by other parts of the Act,¹⁵⁹ applies to workers without regard to immigration status. Thus, the U.S. Supreme Court held in the 1984 *Sure-Tan v. NLRB* decision that unfair labor practices could not be committed against all workers, including those who were not authorized to work in the United States.¹⁶⁰ The question that the Supreme Court left unresolved in *Sure-Tan*, which occupied the NLRB and the lower courts for years thereafter, dealt with the remedies an undocumented worker could claim after a violation of the Act.¹⁶¹

Six months after 9/11, the Supreme Court made it plain that the standard remedy of backpay—wages that would have been earned but for the unlawful termination—was not available for undocumented workers who were fired in retaliation for union organizing. The Immigration Reform and Control Act of 1986 (IRCA) already prohibited reinstatement of an unauthorized worker to his or her former employment for union organizing. The *Hoffman* decision thus removed the remaining effective deterrent against employers who deny the right to association.¹⁶²

The *Hoffman* case was argued and decided in the unsettled days after 9/11. The Court granted certiorari two weeks after September 11.¹⁶³ In

158. 29 U.S.C. § 151 (2000). The legislative findings of the Wagner Act of 1935 stated that workers were powerless to remedy the conditions of their employment except through collective action.

159. 29 U.S.C. § 152(2) (2000).

160. 467 U.S. 883, 896 (1984).

161. *Id.* at 913.

162. The *Hoffman* majority opinion responded that the employer would not get off "scot-free," since the employer was still required to post a notice that it had violated the NLRA and could be subject to contempt proceedings for failing to do so. 535 U.S. at 152. In dissent, Justice Breyer pointed out that the remaining remedies allowed the employer to violate the labor laws, at least once, with impunity. 535 U.S. at 155 (Breyer, J., dissenting).

163. Catherine L. Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB*, in *LABOR LAW STORIES* 399, 421 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

October 2001, the Supreme Court was the target of anthrax-laced letters.¹⁶⁴ Ryan McCortney, the attorney for Hoffman, recounted in a recent interview that when he called the Supreme Court's clerk to inquire about the status of his case, the clerk was working out of a van outside of the courthouse because of the anthrax scare.¹⁶⁵

During this unsettled period, McCortney also decided to broaden the usual conception of an undocumented immigrant from the Mexican sneaking across the border to find work, such as the worker in *Hoffman*, to a student who works in violation of her visa. After all, many of the 9/11 hijackers had entered the country legitimately on student visas.¹⁶⁶

At the oral argument in January 2002, some of the justices seemed more preoccupied with the "massive problem" of illegal immigration than any concern for the effect that the decision might have on workers' rights.¹⁶⁷ Paul Wolfson, the Deputy Solicitor General representing the NLRB, argued that eliminating backpay would erase the right of association for a large number of people currently working in the United States. In response, Justice Scalia retorted:

I would have thought, Mr. Wolfson, that when you said, you know, there are 7 million illegal aliens in this country, that what you would follow that with is not, that's an awful lot of people not to give back pay [sic] to. I would have thought you would follow it with, we have to do something to reduce this massive number of 7 million illegal aliens.¹⁶⁸

The decision itself also reflected a growing urgency to protect the nation's borders, even at the expense of labor law. In his opinion for the five-member Court majority, Chief Justice Rehnquist put it starkly: "There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities."¹⁶⁹

The *Hoffman* decision dealt with immigrant workers more harshly than the *Sure-Tan v. NLRB* decision in 1984, for a variety of reasons,

164. *Id.*

165. *Id.*

166. *Id.*

167. Justice Antonin Scalia, Transcript of Oral Argument at 28, *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) (No. 00-1595), 2002 WL 77224.

168. Transcript of Oral Argument at 43, *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) (No. 00-1595), 2002 WL 77224. See Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003) (stating the IRCA position that illegal aliens cannot get backpay).

169. *Hoffman*, 535 U.S. at 149.

including the IRCA. Justice O'Connor wrote the majority opinion in *Sure-Tan v. NLRB*, which held that an employer calling immigration control into its factory in retaliation for union organizing was a violation of the NLRA.¹⁷⁰ The majority did not have to deal with the backpay question because the workers were out of the country and thus "unavailable" to collect their backpay or mitigate their damages. Justice Rehnquist joined a concurring and dissenting opinion authored by Justice Powell, which agreed that the workers could not get backpay because they were "unavailable" to collect it but disagreed that they were "employees" under the NLRA, finding it "unlikely that Congress intended the term 'employee' to include—for purposes of being accorded the benefits of that protective statute—persons wanted by the United States for the violation of our criminal laws."¹⁷¹

Besides the post-9/11 context, many factors contributed to the decision in *Hoffman*, including a generally increasing concern about the social and economic impact of immigration throughout the 1990s that resulted in measures like California's Proposition 187 and a growing militarization of the border.¹⁷² In addition, the legal context for immigrant workers changed in 1986. The IRCA, passed two years after the *Sure-Tan* decision, made the hiring of undocumented workers illegal under federal law for the first time.¹⁷³ However, the IRCA did not change the definition of "employee" in the NLRA, which since its inception in 1935 has never made any reference to a worker's immigration status.

Thus, the question of whether the undocumented were entitled to the same remedies as all other "employees" came before the Court again in *Hoffman*. The only two members of the Court remaining from the *Sure-Tan* era were Justices Rehnquist and O'Connor. Justice Rehnquist's position may have been forecast by his dissenting opinion in *Sure-Tan*, or his general view that civil liberties must be tempered during wartime:

The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war is over. . . . To lawyers and judges, this may seem a

170. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

171. *Id.* at 913 (Powell, J., concurring and dissenting).

172. See Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (arguing that current anti-discrimination laws ignore discrimination based on immigrant status); Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995) (explaining Proposition 187 as consistent with the racism prevalent in U.S. immigration history); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (discussing the impact of Proposition 187 on "discrete and insular minorities").

173. 8 U.S.C. §§ 1324(a)–(b).

thoroughly undesirable state of affairs, but in the great scheme of things it may be best for all concerned.¹⁷⁴

Justice O'Connor's trajectory from *Sure-Tan* to *Hoffman* is harder to explain.¹⁷⁵ On the one hand, the *Hoffman* opinion affirmed Justice O'Connor's conclusion in *Sure-Tan* that the undocumented workers were "employees," but there were none of the concerns in the *Hoffman* majority opinion that Justice O'Connor expressed in *Sure-Tan* about the negative effects resulting from denial of labor law protections to undocumented workers. Justice O'Connor wrote in *Sure-Tan*:

If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.¹⁷⁶

Justice Kennedy, another member of the *Hoffman* majority, had previously seen the need for labor law protection for immigrants while deciding a case as a judge on the Ninth Circuit Court of Appeals, writing that to do otherwise would "leave helpless the very persons who most need protection from exploitative employer practices."¹⁷⁷ In *Hoffman*, Justices O'Connor and Kennedy simply joined the majority opinion, which did not include any language about why it made sense to bring undocumented workers within the meaning of the term "employee."

There might be many reasons why Justice O'Connor joined the majority opinion in *Hoffman*. However, a prelude to Justice O'Connor's position in *Hoffman* could be seen in a speech at New York University Law School shortly after 9/11, where Justice O'Connor warned that Americans might have to get used to limitations on their freedoms and legal change as a result of the attacks.¹⁷⁸ In her speech, Justice O'Connor primarily

174. MACK & KELLY, *supra* note 69, at 234–35 (quoting Chief Justice Rehnquist's Sept. 18, 1998 lecture at Drake University School of Law, reprinted in 47 DRAKE L. REV. 201–08 (1998)).

175. Justice O'Connor's dissenting opinion in *Ragsdale v. Wolverine Worldwide*, some three weeks before the Court's decision in *Hoffman*, also provides a very different view of administrative deference than the one taken by the *Hoffman* majority. In *Ragsdale*, Justice O'Connor called for deference to the Department of Labor's remedy for violations of the Family and Medical Leave Act. 535 U.S. 81, 102 (2002) (O'Connor, J., dissenting).

176. *Sure-Tan, Inc.*, 467 U.S. at 892 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)).

177. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring).

178. See Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5 ("We're more likely to experience more restrictions on our personal freedom than has ever been the case in our country." (quoting Justice O'Connor)); see also DELGADO, *supra* note 39, at 67–

questioned whether constitutional criminal protections should apply to terrorists rather than the "rules of war," but she made clear that 9/11 "will cause us to re-examine some of our laws pertaining to criminal surveillance, wiretapping, immigration and so on."¹⁷⁹ In addition, Justice O'Connor's position may have evolved, in the words of the *Hoffman* majority opinion, as a result of a "legal landscape now significantly changed" by the IRCA.¹⁸⁰

Ultimately, the *Hoffman* decision highlights the inadequacy of domestic law in a global labor market. International labor and human rights norms apply to all workers regardless of immigration status, and international trade agreements such as the North American Free Trade Agreement also require respecting migrant workers' freedom of association.¹⁸¹ Thus, eight months after the Supreme Court rendered its decision in *Hoffman*, the AFL-CIO filed a complaint with the International Labor Organization's (ILO) Committee on Freedom of Association, asserting that the *Hoffman* decision violated ILO Convention 87, which protects freedom of association for all workers "without distinction whatsoever."¹⁸² In November 2003, the ILO Committee on Freedom of Association sent the complaint to the next level of review, the Commission of Inquiry, and invited the United States to "explore all possible solutions, including amending its legislation" to redress the denial of freedom of association to migrants.¹⁸³ The Committee concluded that the remedial measures available to the NLRB regarding the dismissal of undocumented workers were inadequate protection "against acts of anti-union discrimination."¹⁸⁴ The Inter-American Court of Human Rights similarly

68 (interpreting Justice O'Connor's speech as a forewarning of more government restriction on personal freedom).

179. Greenhouse, *supra* note 178, at B5 (quoting Justice O'Connor).

180. *Hoffman*, 535 U.S. at 147.

181. See International Labor Organization Conventions 87 and 98, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> (last visited Jan. 15, 2006) (reciting the ILO agreements on the protection of workers' freedom of association and the right to organize); North American Agreement on Labor Cooperation, *supra* note 31 (recognizing the protection of freedom of association and the right to organize as a guiding principle of the NALC).

182. See A. Pankert, *Freedom of Association*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 146 (R. Blanpain & F. Millard eds., 1982) (exploring the conflict between trade unions and governments over the freedom of association); Jane Hodges-Aeberhard, *The Right to Organize in Article 2 of Convention 87: What Is Meant by Workers "Without Distinction Whatsoever"?*, 128 INT'L LAB. REV. 177, 193 (1989) (discussing the implications of the "without distinctions whatsoever" provision of ILO Convention 87).

183. Press Release, International Labour Organization, ILO Governing Body Establishes Commission of Inquiry to Examine Violations of Trade Union Rights in Belarus (Nov. 20, 2003), <http://www.ilo.org/public/english/bureau/inf/pr/2003/48.htm>.

184. Complaints Against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organization (AFL-CIO) and

found that the decision violated regional human rights principles.¹⁸⁵

The legal maneuvering over the labor rights of immigrants takes place in the context of growing restriction on the political rights of immigrants.¹⁸⁶ The USA PATRIOT Act provided the Attorney General with broad powers to indefinitely detain immigrants on certain “watch lists.” Noncitizens on these lists are stripped of the regular administrative immigration procedures to which other immigrants are normally entitled. Five months after Congress passed the USA PATRIOT Act, which removes immigrants defined as “terrorists” from immigration administrative processes, the U.S. Supreme Court, in its *Hoffman* opinion, eliminated backpay for undocumented workers seeking to redress labor violations. Thus, the first effects of the War on Terror in the workplace have been borne directly by immigrant workers, but the impact will eventually be felt by all workers. The reduced likelihood that undocumented workers will organize will mean a reduction in the bargaining power of all workers.

Immigrants have become more important to the leaders of the labor movement as unionization has declined with the erosion of the manufacturing sector. In 2000, the AFL-CIO shifted positions and supported amnesty for undocumented workers in the United States. Immigrants are particularly important to the labor movement in California, where a recent survey showed that 54% of foreign-born noncitizens would vote for union representation, whereas only 42% of native-born U.S. citizens showed interest in union representation.¹⁸⁷ Thus, immigrants promise to be labor’s greatest hope to stem its decline in membership. If immigrants are deterred from unionizing because of the lack of legal protections, the ability of all workers to associate will suffer.

The inverse dialectic between domestic insecurity and workers’ rights is similar to the relationship between domestic insecurity and attacks on minorities and immigrants. The fact that many workers affected by the War on Terror are people of color, immigrants, or both, compounds this

the Confederation of Mexican Workers (CTM), Rep. No. 332, Case No. 2227, *available at* <http://www.ilo.org/ilolex/index.htm> (Follow “specific country” hyperlink, then “United States” hyperlink, then “Freedom of Association” hyperlink) (last visited Jan. 15, 2006).

185. Sarah Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers’ Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795 (2003).

186. See Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 606 (2004) (arguing that discrimination against immigrant workers threatens to undermine the rights of all workers); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 486 (2002) (arguing that national security can be compatible with democracy).

187. Margaret Weir, *Income Polarization and California’s Social Contract*, THE STATE OF CALIFORNIA LABOR 97, 121 (2002), *available at* <http://www.iir.ucla.edu/scf/pdf02/scf2002ch5.pdf>.

dialectic.¹⁸⁸ Besides the loss of freedom of association, workers of color have been subject to English-only policies in the name of national security and the possibility that the privacy of their employment records would be overridden by the USA PATRIOT Act.¹⁸⁹

B. The Effect of the War on Terror on Administrative Adjudication at the NLRB

The environment created by the War on Terror has affected nonunion workers as well as unionized workers. This is because the War on Terror has become a justification in recent decisions of the NLRB, weakening the right of association for nonunion workers as well as unionized workers. The NLRB is the federal agency charged with enforcing federal labor law, both as a prosecutor of unfair labor practice charges and as an adjudicator of labor rights through administrative law judges under the supervision of the five-member Board in Washington, D.C. The NLRA gives the President the power, with the advice and consent of the Senate, to appoint members to the Board for five-year terms.¹⁹⁰ In practice, Democrats and Republicans have divided the appointments, though appointments from the President's party always form a 3-2 majority.¹⁹¹ For this reason, in Republican as well as Democratic administrations, the Board has been criticized as being merely a mouthpiece for the President's labor policy.¹⁹²

188. "War on Terror" is a contested phrase. Noam Chomsky has argued that the "War on Terror" is a logical impossibility because there is no single definition of "terror"; rather, "terror" is contingent, contextual, and perspectival. CHOMSKY, *supra* note 11.

189. See EEOC Directives Transmittal No. 915.003, COMPLIANCE MANUAL Section 13, Dec. 2, 2002 (clarifying that because of the USA PATRIOT Act, employers do not violate Title VII by cooperating with law enforcement officers seeking access to employee personnel files); Mary Lou Pickel, *Refugees Want Airport Jobs Back; English-only Test Unfair*, *Somalis Say*, ATLANTA J. CONST., Feb. 12, 2004, at E1 ("A move to tighten airport security by requiring that workers read enough English to pass a written test has cost a group of Somali refugees their jobs at Hartsfield-Jackson International Airport."); see also FREDERICK S. LANE III, *THE NAKED EMPLOYEE: HOW TECHNOLOGY IS COMPROMISING WORKPLACE PRIVACY* 19-22 (2003) (explaining the disappearance of employee privacy as an inevitable consequence of corporate electronic surveillance); JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 135 (2004) (arguing that electronic spying by the government is an intrusion of privacy); Jessica LaBumbard, *Homeland Security Targets Immigrants Working With Hazardous Chemicals*, LAB. NOTES, Dec. 2003 (noting the targeting by immigration authorities of hazardous chemical industries).

190. 29 U.S.C. § 153(a) (2000).

191. See WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS AND THE NLRB—A MEMOIR* 54 (2000) (describing President Clinton's appointees to the NLRB).

192. See *id.* at 255-86 (2000) (describing how Clinton-appointed Board Chairman Gould became the "Number One Enemy" of the House Republicans); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 22-23 (1996) (describing how unions vehemently criticized the Reagan appointed Board while

Since George W. Bush has been President, his appointees have used the threat of terrorism as a reason for decisions that have limited labor's freedom of association.

C. The Decision in International Protective Services: Limits on the Right to Strike

Section 7 of the NLRA protects employees who "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁹³ This broad protection of freedom of association has been held to prevent discipline of unionized and nonunion employees who cease work to redress workplace issues, such as a walk-out to protest safety conditions.¹⁹⁴ The Board long has held that section 7 also protects the right to strike without giving notice to the employer, unless the notice is required by some other provision of the NLRA, by contract, or is otherwise required to protect the employer's interests.¹⁹⁵ The ILO's Committee on Freedom of Association has found the right to strike to be an "essential means available to workers and their organisations [sic] for the promotion and protection of their social and economic interests."¹⁹⁶

Although section 13 of the NLRA states that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right,"¹⁹⁷ the Board and the courts have found a number of limitations on the right to engage an immediate strike.¹⁹⁸ For example, the Board has held that strikes were illegal when they endangered the employer's property, or exposed the

employers complained that the Kennedy and Johnson Boards tended to favor unions).

193. 29 U.S.C. § 157 (2000).

194. See *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 841 (1984) (holding that an employee was engaged in protected concerted action when he refused to drive a truck he believed was unsafe); *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) (holding that the employees who walked out due to unsatisfactory work conditions were engaged in protected concerted activity).

195. See *Wash. Aluminum*, 370 U.S. at 14 (agreeing with the Board's decision that employees were not required to present demands to the employer in order to qualify for concerted activity protection).

196. SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* 194 (1992) (quoting ILO Digest of Decisions (3d ed. 1985) ¶ 360-63).

197. 29 U.S.C. § 163 (2000).

198. See James Gray Pope, *How Americans Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 550-51 (2004) (explaining the reversal of important labor rights within the context of constitutional doctrine); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942 (1997) (discussing labor's struggle for freedom within the context of constitutional history); Katherine V. W. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (arguing that the Supreme Court tends to favor management in labor-management disputes).

plant, equipment or products to “foreseeable imminent danger due to sudden cessation of work.”¹⁹⁹

The question of what constitutes “imminent danger” to an employer’s property requiring notice of a strike came before the Board in 2003 in *Int’l Protective Services, Inc.*,²⁰⁰ relating to the fears of domestic terrorism against federal buildings after the 1995 Oklahoma City federal building bombing. In the late 1990s, the U.S. government contracted with a private company, International Protective Services (IPS), to provide security at the federal building in Anchorage, Alaska.²⁰¹ The security workers were represented by the United Government Security Officers of America, Local 46 and sought to obtain a first collective bargaining agreement with IPS.²⁰² On March 10, 1999, with negotiations between IPS and the union stalled, the union informed the government’s General Services Administration (GSA) of its intent to strike “within the next few weeks” and that the strike would occur at “the most opportune time for the Union.”²⁰³ The timing of a strike at the most inopportune time for the employer is a major source of the economic leverage the union gains in striking. As is typical of the process in most unions, the membership of Local 46 voted to give Union President Charles Reed the authority to call the strike at the “appropriate time.”²⁰⁴ Reed sought to call the strike on March 23 but was stymied by many workers who did not want to strike because of security concerns stemming from the anniversary of the Oklahoma City federal building bombing approaching, which was approaching on April 19.²⁰⁵

Finally, on April 21, the union commenced the strike at noon. The employer had already made preparations to replace the nineteen striking workers, and by April 23, the employer sent a letter to the workers notifying them that they “self-terminated” their employment by abandoning their post.²⁰⁶ The Administrative Law Judge found that the union’s April 21 strike was “designed” to compromise security.²⁰⁷

On July 15, 2003, a three-member panel of the Board upheld the ALJ’s decision finding that the strike was not protected by the NLRA. Although there was no specific threat on the Anchorage federal building,

199. *Int’l Protective Services, Inc.*, 339 N.L.R.B. No. 75 1, 4 (2003) (quoting Bethany Medical Center, 328 N.L.R.B. 1094, 1094 (1999)).

200. *Int’l Protective Services, Inc.*, 339 N.L.R.B. No. 75 (2003), available at http://www.nlr.gov/nlrb/shared_files/decisions/339/339-75.htm.

201. *Id.*

202. *Id.*

203. *Id.* (internal quotation marks omitted).

204. *Id.* (internal quotation marks omitted).

205. *Id.*

206. *Id.* app. (appended decision by Administrative Law Judge Gerald A. Wacknov).

207. *Int’l Protective Services, Inc.*, 339 N.L.R.B. No. 75 (2003), available at http://www.nlr.gov/nlrb/shared_files/decisions/339/339-75.htm.

the Board stated that, because of the Oklahoma City federal building bombing anniversary and several other “ominous anniversaries of infamous individuals,” the union’s strike “recklessly intended to place the Federal buildings and their occupants at risk.”²⁰⁸ The employer thus did not violate the NLRA by terminating the workers for their strike.

The *IPS* decision can be viewed as merely an extension of the law that is unfriendly to the right to strike. James Gray Pope and other scholars have pointed to numerous examples of judicial gloss placed on otherwise clear statutory language protecting the right to strike and associate, which have led to a weakening of labor’s freedom of association.²⁰⁹ The *IPS* decision can also be seen as legitimate borrowing of norms limiting strikes in the public sector when the federal government contracts with private employers. It is important to note that this borrowing is not compelled by statute but simply a decision by the Board about whether a strike is so disloyal that employees should lose NLRA section 7 protection. While the law finding “disloyal or indefensible” strikes unprotected has not changed, it appears more likely after 9/11 that judges will find strikes touching upon national security or vague threats of terrorism to be unprotected.

D. The Board’s Decision in IBM Corp.: Terrorism as Justification

Until June 2004, section 7 of the NLRA also protected the right of nonunion workers to request that a co-employee accompany them to a disciplinary interview on the theory that such activity was part of “mutual aid or protection” for all employees, regardless of union representation. In *IBM Corp.*,²¹⁰ the NLRB reversed course and held that section 7 did not protect nonunion employees from retaliation if they requested representation at an interview likely to lead to discipline, a right guaranteed to unionized employees by the U.S. Supreme Court’s 1975 decision in *NLRB v. J. Weingarten Inc.*²¹¹ The NLRB first extended the *Weingarten* decision to nonunion workers in its *Materials Research* decision in 1982.²¹² Three years later, in *Sears Roebuck*, the Board changed course again and held that the *Weingarten* decision was meant to apply only to union

208. *Id.* at 5.

209. See JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19 (1983) (arguing that Supreme Court decisions are unduly biased against the right to strike); Karl Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW 540, 550–53 (3d ed. 1998) (arguing that over-use of arbitration tends to divest workers of important rights); Pope, *supra* note 198 (discussing the pattern of Supreme Court reversals of important labor rights).

210. 341 N.L.R.B. No. 148 (2004).

211. 420 U.S. 251 (1975).

212. *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982).

workers.²¹³ The difference between the two decisions appeared to be explainable by the fact that, by 1985, a majority of the Board had been appointed by Republican President Ronald Reagan. In 2000, when a majority of the Board had been appointed by Democratic President Bill Clinton, the Board went back to the *Materials Research* rule and held in *Epilepsy Foundation of Northeast Ohio* that the NLRA protected the right of nonunion employees to request representation at disciplinary interviews.²¹⁴ The Board reasoned that the *Weingarten* decision was grounded in the text of NLRA section 7 and that "section 7 rights are enjoyed by all employees and are [not] dependent on union representation for their implementation."²¹⁵

By January 2004, three new Republican appointees had joined Democratic appointees Dennis Walsh and Wilma Liebman on the five-member Board.²¹⁶ In June 2004, the Board reversed *Epilepsy Foundation* by a three-to-two vote, holding that nonunion employees did not have the right to request representation at the beginning of an investigation likely to lead to discipline.²¹⁷ Although the decisions of the Board are often criticized as being blatantly politicized, in *IBM Corp.*, the Board's Republican majority utilized the new War on Terror as a justification for limiting the *Weingarten* rule to unionized employees. Pointing to "a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country,"²¹⁸ the Board majority concluded that employers must be allowed "to investigate an employee without the presence of a coworker."²¹⁹ The Board's connection to a "changed world" was explicitly focused on 9/11:

In recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence . . .²²⁰

...

213. 274 N.L.R.B. 230 (1985).

214. *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676, 678 (2000) (quoting *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309, 1311 (1978)).

215. *Id.* at 678.

216. In January 2004, President Bush appointed Ronald Meisburg to replace R. Alexander Acosta, who left the Board in August 2003 to be Assistant Attorney General for Civil Rights. National Labor Relations Board Members, <http://www.nlr.gov/nlr/about/structure/fbmembers.asp> (last visited Jan. 15, 2006).

217. *IBM Corp.*, 341 N.L.R.B. No. 148 (2004), available at http://www.nlr.gov/nlr/shared_files/decisions/341/341-148.pdf.

218. *Id.* at 6.

219. *Id.* at 4.

220. *Id.* at 3.

Further, because of the [September 11, 2001 terrorist attacks], we must now take into account the presence of both real and threatened terrorist attacks.²²¹

In dissent, the two Democratic members of the Board chastised the majority for opening the American workplace as a new front in the War on Terror.²²² The dissent stated, “We are told . . . that everything has changed in ‘today’s troubled world,’ following ‘terrorist attacks on our country,’ the rise of workplace violence, and an increase in ‘corporate abuse and fiduciary lapses.’”²²³ In any event, the dissenters complained, much of today’s crime is limited to the executive suites.²²⁴ The majority retorted that the Board was not encouraging private employers to wage war on employee rights, but rather was simply refusing to forbid employers from “hold[ing] such private inquiries” of their employees.²²⁵

The colloquy between the majority and the dissent in *IBM* reflects the highly partisan nature of NLRB decisionmaking. The Republican-dominated NLRB would have likely overruled *Epilepsy Foundation*, regardless of the 9/11 terrorist attacks. However, the explicit references to the War on Terror indicate that the 9/11 attacks provided legitimization for the decision because of a “changed world” and a changed workplace. In a public speech at New York University after the decision, NLRB Chairman Robert J. Battista again invoked “the global war on terrorism” as one of the challenges facing the nation, which suggests that the *IBM* decision will not be the last to use the War on Terror as a justification.²²⁶ The political context serves as a catalyst for the devolution of rights.

E. Firstline Transportation Security: The Creeping of the Public into the Private

Indeed, a case currently pending before the Board may introduce a “national security” exception to collective bargaining. The case involves airport screeners at Kansas City International Airport who sought to be represented by a private sector union. The Kansas City airport is one of four airports participating in a pilot program allowing private contractors to provide airport security services.²²⁷ In this pilot program, the TSA places

221. *Id.* at 4.

222. *Id.* at 18 (Liebman, J. & Walsh, J., dissenting).

223. *Id.*

224. *Id.*

225. *Id.* at 11.

226. NLRB Chairman Battista’s Speech at New York University’s Labor Conference, DAILY LAB. REP., May 23, 2005, at C1.

227. Firstline Transp. Sec., NLRB 17th Reg., Case No. 17-RC-12354 (May 27, 2005), available at [http://www.nlr.gov/nlr/shared_files/decisions/dde/2005/17-RC-12354\(5-27-05\).pdf](http://www.nlr.gov/nlr/shared_files/decisions/dde/2005/17-RC-12354(5-27-05).pdf).

the same restrictions on the employees of private contractors as it does on its own employees. Among other restrictions, the workers must be U.S. citizens, they must not present a national security risk, and they are not allowed to strike. In his capacity as administrator of secret-ballot elections deciding union representation, the Regional Director in Kansas City entertained a petition filed by the Security, Police and Fire Professionals of America (SPFPA) to represent the security screeners. The case highlights a trend raised by the *International Protective Services* case discussed above, where the federal government contracts out security functions. The Firstline Company made two arguments to the Regional Director of the NLRB Kansas City region: (1) that the screeners were not covered by the NLRA because of the Airline Transportation Safety Act (ATSA); and, alternatively, (2) an undefined national security exception to the right of private sector employees exempted the screeners from collective bargaining.²²⁸

On May 27, 2005, NLRB Regional Director D. McConnell in Overland Park, Kansas, decided that both of Firstline's arguments lacked merit and subsequently ordered an election. McConnell rejected the argument that the ATSA preempted or modified the NLRA, finding that neither Congress nor the agency had taken a position on the collective bargaining rights of private security screener employees, other than their belief that neither group had the right to strike.²²⁹ The Regional Director decided that the ATSA did not prevent the screeners from exercising the labor rights of private employees. As for the national security exception, the Regional Director failed to find it in the text of the statute. "In some circumstances," McConnell wrote, "policy considerations do militate in favor of or against the assertion of the Board's discretionary jurisdiction. The goal in the instant case is to balance the Board's interest in effectuating the purposes and policies of the Act, with the Federal Government's interest in protecting national security."²³⁰ McConnell concluded that national security and collective bargaining for the contractor screeners were compatible because the screeners had no right to strike and the private employees would be subject to the same training and requirements as federal employees.²³¹

Parties aggrieved by a Regional Director's administration of an election can request review, as Firstline did, by the five-member Board in Washington, D.C., for "compelling reasons."²³² On June 30, 2005, the Board granted Firstline's petition for review and invited amicus briefs on

228. *Id.* at 2.

229. *Id.* at 7.

230. *Id.* at 10.

231. *Id.* at 10–11.

232. 29 C.F.R. § 102.67(c)(4) (2005).

the case.²³³

In a dissent from the decision to grant review, Board member Wilma Liebman opened her opinion by quoting Professor Joseph Slater's work on the DHS and the TSA: "For decades, the statutory pronouncements of Congress and most state legislatures have favored collective bargaining in private and public employment. Now this principle is under attack."²³⁴ Liebman argued that the Board should not have accepted the employer's invitation to "create an unprecedented 'national security' exception to its jurisdiction, assuming it has the power to do so."²³⁵ Liebman pointed to many instances where the Board rejected attempts to deny the protections of the NLRA to employees working in security-sensitive employment, such as employees in nuclear power plants and militarized plant guards.²³⁶ Besides explaining why peaceful resolution of disputes actually enhanced security, Liebman also pointed out that if the Board agreed with the employer's position, it "arguably would violate the international obligations of the United States to protect workplace freedom of association."²³⁷

While Clinton appointee Liebman would have denied review because of the potential for another decision like *IBM*, Bush appointees Battista and Schaumber cautioned that Liebman assumed the majority had prejudged the case by granting review, when in fact, "[n]othing could be further from the truth."²³⁸ Indeed, the Board has not yet decided the issue of whether security screeners employed by private companies should engage in collective bargaining. Nevertheless, its prior decisions, and the general climate of suspicion of freedom of association in the post-9/11 period, suggests an uphill battle for the airport screeners' union. It is also likely that the decision will take place without serious examination of the empirical evidence that shows unionized workers actually aid security. Member Liebman pointed out in her *IBM* dissent that the Board majority had no empirical support for its conclusion that too many rights leads to less security: "With little interest in empirical evidence, the majority confidently says that recognizing [a right for nonunion employees to have a

233. Susan J. McGolrick, *NLRB Invites Amicus Briefs on Whether Private Airport Screeners Covered by NLRA*, Daily Lab. Rep. (BNA), July 8, 2005, at A-1.

234. Firstline Transp. Sec., 344 N.L.R.B. 124, at 1 (2005) (Member Liebman, dissenting) (quoting Slater, *supra* note 115, at 297).

235. *Id.* at 1-2.

236. *Id.* (citing Gen. Elec. Co., 89 N.L.R.B. 726, 736 (1950); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947); *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947)).

237. *Id.* at 2. Liebman also noted that the American Federation of Government Employees (AFGE) had brought a complaint regarding the exclusion of the federal workers in the ILO. *Id.* at n.11 (citing Int'l Labor Org. Case No. 2292, presented by the American Federation of Government Employees).

238. *Id.* at 1, n.1.

coworker present during a disciplinary interview] would make it impossible for nonunion employers to conduct effective workplace investigations and so would endanger the workplace.”²³⁹ There is already evidence that the employee turnover rates of TSA screeners are continually approaching the high turnover rates of screeners before the jobs were federalized.²⁴⁰ Further, since both private contractor screeners and federal employees would be unable to strike, there would be no threat to national security except through an unlikely repeat of the illegal PATCO strike.²⁴¹

As Justice Breyer pointed out in his dissenting opinion in *Hoffman*, the Supreme Court majority was not interested in the empirical reality that denying backpay would not lead to tighter borders.²⁴² Justice Breyer observed that the availability of jobs, not backpay, is the magnet bringing the undocumented to the United States: “To permit the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual’s decision to migrate illegally.”²⁴³ Given the post-*Hoffman* resort to international forums, and given the current political climate, it seems unlikely that Congress will clarify that immigrant workers have remedies under the NLRA.

239. IBM Corp., 341 N.L.R.B. No. 148, at 18 (2004).

240. Stephen Barr, *TSA Scrambling to Keep Up with Turnover Among Screeners*, WASH. POST, Feb. 18, 2004, at B2; Sara Kehaulani Goo, *High Turnover at Agency Raises Concern for Air Safety*, WASH. POST, Apr. 9, 2005, at A09. A report by the American Federation of Government Employees cited reports in the Los Angeles Times, Chicago Tribune, and Washington Post documenting a turnover rate that went from 20% to 30% from August 2004 to April 2005. American Federation of Government Employees, *Empower Screeners to Ensure Security* (May 2005), available at <http://www.afge.org/Documents/TSA%20White%20Paper.doc>.

241. Even during the PATCO strike, replacement workers kept the system running, which certainly limited the effectiveness of the strike. See Northrup, *supra* note 140, at 252 (explaining how replacement workers were crucial to the system’s functioning).

242. Nearly ten years after Congress passed the Immigration Reform and Control Act of 1986, immigration to the United States continues unabated. This is an example of how laws affecting immigrants actually have little impact on whether migrants make the journey to the United States.

243. *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting) (citing A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 410–15 (1995) (showing no significant influence from so speculative a factor); *Patel v. Quality Inn South*, 846 F. 2d 700, 704 (11th Cir. 1988) (explaining that aliens enter the country in the hope of getting a job, not to gain the protection of our labor laws)).

V. REINVIGORATING LABOR'S FREEDOM OF ASSOCIATION POST-9/11

A. *Why Freedom of Association Is Good for Security*

There is little doubt that the threat of new terrorism inside the United States is real and dangerous.²⁴⁴ Criminals or terrorists should not be allowed to hide behind the right of association. Indeed, when union officials corrupted by mob influence have asserted that their prosecution violated freedom of association, these arguments have been rejected.²⁴⁵ One might argue that allowing undocumented immigrants in unions is a threat to national security. This argument, however, treats unions differently than other associations, and undocumented immigrants are protected by the constitutional right of association just as any other person within U.S. jurisdiction.²⁴⁶

Encouraging associations is good for the security of unions and for the security of their members' employment. In addition, there is reason to think that enhancing freedom of association would be good for our collective security. Freedom of association in the workplace is critical to the functioning of a democratic society. It is not a historical accident that oppressive regimes tend to restrict the right of association in the workplace. Myanmar and Indonesia are two examples of countries known for human rights abuses that also restrict or ban the right to organize.²⁴⁷ Whether or

244. The recent terrorist attacks in London suggest that 9/11 will not be the last attempt to attack targets within the United States. See Peter Bergen, *Our Ally, Our Problem*, N.Y. TIMES, July 8, 2005, at A23 (noting how the United States' Visa Waiver Program makes it easy for Britain's angry young Muslims to board a plane for the United States); Paul Vitello, *In Americans, Lurking Fears Rise to Surface*, N.Y. TIMES, July 8, 2005, at A1 (noting that Americans were experiencing "raw emotion" after the attack on London, "a capital so closely related to America culturally").

245. See *Hotel & Rest. Employees & Bartenders Int'l Union Local 54 v. Read*, 597 F. Supp. 1431, 1446–51 (D.N.J. 1984) (rejecting the claim that New Jersey Casino Control Commission's order requiring removal of union officials based upon their organized crime associations violated the First Amendment right to freedom of association), *aff'd mem.* 772 F.2d 893 (3d Cir. 1985).

246. See *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995), *rev'd on other grounds*, 525 U.S. 471 (1999) ("[T]he foreign policy powers which permit the political branches great discretion to determine which aliens to exclude from entering this country do not authorize those political branches to subject aliens who reside here to a fundamentally different First Amendment associational right.")

247. See, e.g., Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C6 (describing the atrocities Myanmar employees were subjected to, including forced labor "in intense tropical heat with little food or rest"); Sara Davis & Mickey Spiegel, *Take Tough Action to End China's Mining Tragedies*, WALL ST. J., Feb. 18, 2005, available at <http://hrw.org/english/docs/2005/02/23/china10203.htm> (explaining that Chinese mineworkers are forbidden to organize under Chinese law); *U.S./Indonesia: Bush Backtracks on Corporate Responsibility*, HUMAN RIGHTS WATCH, Aug. 7, 2002, available at <http://www.hrw.org/press/2002/08/>

not increased unionization is the cause or effect of political liberalization, liberties are under strain without an independent trade union movement. Workplace association inevitably leads to greater political activity, as the higher level of political participation by union members attests.²⁴⁸

The lack of associations will lead to a weaker bulwark against terrorism. The "United We Stand" slogan used in the days after 9/11 could just as easily be applied to the unity and solidarity that comes from associations, particularly unions. To the extent that unions and other associations bring people of disparate backgrounds together to pursue common goals, they may be necessary now more than ever.²⁴⁹ As we spend most of our time at work, the workplace is the last remaining locus of unity that most of us have. To deny and stifle the autonomy of workplace associations means that fewer people will have an investment in American democracy.

Besides the democratic benefits that associations provide, unions have played important roles in improving security since 9/11. For example, at a time when port security is a major concern, the International Longshore and Warehouse Union (ILWU) has been vocal about the need to hire more workers.²⁵⁰ Having more workers at ports would allow shipping companies to inspect a greater number of containers that arrive in ports. In New York, unionized doormen at apartment buildings have received training in how to recognize suspicious packages and deal with terrorist incidents.²⁵¹ Sometimes, unions engage in interest group activity for their own reasons, which also may be consistent with concerns about safety. Recently,

exxon080702.htm (describing the U.S. State Department's attempt to get a lawsuit against Exxon Mobil dismissed by a federal judge).

248. TAYLOR E. DARK, *THE UNIONS AND THE DEMOCRATS: AN ENDURING ALLIANCE* 50–51 (rev. ed. 2004).

249. See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW THE WORKPLACE ASSOCIATIONS STRENGTHEN BONDS IN A DIVERSE SOCIETY* 104 (2003) ("The process of working together leads to a sharing of experiences and beliefs . . . among citizens whose daily lives may not otherwise intersect."); see also ROBERT D. PUTNAM & LEWIS M. FELDSTEIN, *BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY* 282 (2003) (supporting the idea that associations can aid the fight against terror by "bridging social difference[s]"); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 80–92 (2000) (describing a decline of American participation in civic organizations, especially unions, since the 1950s).

250. John M. Broder, *At Nation's Ports, Cargo Backlog Raises Question of Security*, N.Y. TIMES, July 27, 2004, at A12.

251. See Sara B. Miller, *In War on Terror, An Expanding Citizens' Brigade*, CHRISTIAN SCIENCE MONITOR, Aug. 13, 2004, available at <http://www.csmonitor.com/2004/0813/p01s02-ussc.html> (describing how SEIU Local 32BJ conducted training for its members on how to recognize and respond to terrorist activities); Lore Croghan, *Training Against Terrorism*, N.Y. DAILY NEWS, June 7, 2004 (describing how the Local 32BJ program called Project New York Safe and Secure was created during contract negotiations in 2003), available at <http://www.nydailynews.com/business/v-pfriendly/story/200461p-173054c.html>.

Association of Flight Attendants president Patricia Friend testified against the use of cell phones in flight on airplanes in part because of the burden that it places on flight attendants but also because cell phones may be used to detonate bombs.²⁵² The July 7, 2005 bombings in the London Underground led transit unions in England and the United States to question whether or not enough was being done to safeguard urban rail systems. The Rail, Maritime and Transport Union is threatening to strike unless there is an increase in the number of workers in the London subway.²⁵³ In New York City, the Transport Workers Union (TWU) hired a security firm to assist its members in dealing with terrorism because the union felt that the city had failed to provide that type of training.²⁵⁴ Roger Toussaint, the president of TWU, wrote in a *New York Times* opinion piece about the City's inadequate response to terrorist threats: "[T]he transportation authority's emergency-training program is limited to a brochure distributed to its employees and a public 'eyes and ears' campaign—a tepid response that would be laughable if the situation was not so serious."²⁵⁵

Demands by unions to increase the number of workers on the job may cause some to believe that what the union is really doing is "featherbedding." In extreme cases, the practice of a union negotiating so that an employer hires more workers than necessary can be a violation of federal labor law. Section 8(b)(6) of the Taft-Hartley Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value. . . for services which are not performed or not to be performed."²⁵⁶ Job preservation clauses or hiring goal provisions, however, have been held not to violate this section.²⁵⁷ For transit unions and other transportation workers, then, security may be inextricably linked to worker safety, and thus the unions would have strong incentives to bargain vigorously over security issues and staffing levels.

Unions may enhance security in other ways as well. Unionized workforces, because of their higher wages, lower turnover and better training, are more suited to deal with security issues. While more expensive in wages and benefits, economists Freeman and Medoff have shown the long-term economic advantages of unions for employers, such as

252. *Cell Phones on Planes: Nuisance or Necessity?*, Associated Press, July 14, 2005, available at WESTLAW, Westlaw Directory, APNEWS database.

253. Salamander Davoudi, *Police Step-Up Random Search of Tube Passengers*, FIN. TIMES, July 22, 2005, available at 2005 WLNR 11515435.

254. Sewall Chan, *Transit Union Hires Security Trainer, Saying M.T.A. Is Not Doing Enough*, N.Y. TIMES, July 21, 2005, at B6.

255. Roger Toussaint, *Underground Warfare*, N.Y. TIMES, July 24, 2005, at 11.

256. 29 U.S.C. § 158(b)(6) (2000).

257. GORMAN & FINKIN, *supra* note 100, at 283–85.

lower turnover and resulting lower training costs.²⁵⁸ Unionized workforces generally have better protection from unjust dismissal than nonunion workers, so they are better protected as whistleblowers.²⁵⁹ Given the difficulties sometimes attendant in utilizing statutory whistleblower protections, such as the availability of remedies or the requirement in constitutional law that the matter must be of "public concern," protections like arbitration and civil service are more likely to lead to employees voicing security concerns at work.²⁶⁰

The historical origins of the need for protection of labor's freedom of association should not be forgotten. Indeed, unions were given legal legitimacy in the 1930s precisely because they were seen to stave off industrial sabotage and instability.²⁶¹ The massive labor unrest that led to the passage of the Act was disorderly and often posed a threat to public safety. There were often violent confrontations between striking workers and strikebreakers hired by companies to break the strikes.²⁶² In addition, government and law enforcement officials often cooperated with companies against striking workers.

For example, the San Francisco General Strike of 1934 started as a strike of longshore workers and ended up shutting down the City of San Francisco for several days.²⁶³ In the Colorado Coal Strike of 1913 to 1914, the Colorado Governor brought in the National Guard, which led to a

258. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 103, 106 (1984) (pointing to evidence from a national longitudinal survey in which unionized employees were shown to have quitting rates twenty points lower than nonunion employees).

259. See Jesselyn Radack, *The Government Attorney Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003) (describing the case of Coleen Rowley, an FBI attorney who blew the whistle on intelligence failures).

260. See Randy J. Kozel, *Reconceptualizing Employee Speech*, 99 NW. U. L. REV. 1007, 1038 (2005) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.") (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)); Kevin Rivoli, *Blowing the Whistle Can Lead to Harsh Aftermath, Despite Law*, USA TODAY, Aug. 2, 2005, available at http://www.usatoday.com/money/workplace/2005-07-31-whistle-usat_x.htm (recounting the difficulties of protecting whistleblowers in spite of the Sarbanes-Oxley Act).

261. The 1960 U.S. Supreme Court cases comprising the "Steelworkers Trilogy" established union-run grievance arbitration as the preferred means for peaceful resolution of labor disputes. Katherine Van Wezel Stone, *The Steelworkers Trilogy: The Evolution of Labor Arbitration*, in *LABOR LAW STORIES* 149 (Laura M. Cooper & Catherine M. Stone eds., 2005) (citing *United Steelworkers of Am. v. Am. Mfg.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car*, 363 U.S. 593 (1960)).

262. Joseph E. Slater, *The Court Does Not Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 1029 (2000) (describing Congress' prohibition on police strikes in the District of Columbia after Boston's police strike of 1919 and how many cities soon followed suit).

263. JEREMY BRECHER, *STRIKE!* 159 (1997).

massacre.²⁶⁴ The violent history of the labor movement led to a lasting impression that organized labor results in violence and that labor rights are a threat to national security. However, it is important to note that strikes escalated to a violent level often because of employer unwillingness to negotiate and collusion with government and law enforcement officials. Although the years after the passage of the NLRA were marked by more mass demonstrations to solidify labor's right to organize, orderly collective bargaining and the right to bargain has led to fewer large, violent disruptive strikes since 1935.²⁶⁵

Fears about the conflicts between law enforcement bargaining and public order can be readily addressed. Law enforcement employees, of course, have always had their right to strike limited.²⁶⁶ The ILO has recognized certain exceptions to collective bargaining for employees in sensitive positions. Of course, there is always the possibility that wrongdoers will infiltrate law enforcement organizations and attempt sabotage, but that possibility will exist regardless of unionization. Finally, after the PATCO debacle, it is unlikely that federal employees will engage in another illegal strike risking security.

The material benefits to the lower tiers of the socioeconomic scale provided by unions cannot be overlooked as a way to increase security.²⁶⁷ With the decline of unionization, we have seen a growing gulf between the rich and poor in American society.²⁶⁸ Scholars have pointed to the growing global gulf between rich and poor countries as one of the leading causes of terrorism.²⁶⁹ If American society continues to be economically stratified, it might become fertile breeding ground for domestic terrorism, as has been

264. See HOWARD ZINN ET AL., *THREE STRIKES: MINERS, MUSICIANS, SALESGIRLS AND THE FIGHTING SPIRIT OF LABOR'S LAST CENTURY* 5 (2002) (describing an instance of strike-related violence).

265. See BEVERLY J. SILVER, *FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870* (2004) (describing how local labor movements have been related to world-scale political, economic and social processes).

266. Slater, *supra* note 262.

267. See Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, in *ASSOCIATIONS AND DEMOCRACY* 7, 80 (1998) ("[A]n environment featuring a low social wage, low union density and highly decentralized union organization is dense with incentives for collectively irrational conflict.").

268. See BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2002) (showing the difficulty of living on minimum wage in America by working in various low-paying jobs); DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 6 (2004) (reporting a median net worth of \$833,600 among the top 10% and just \$7900 for the bottom 20% of the economy).

269. See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (arguing that policies imposed on developing countries through international trade agreements need to be radically rethought); CHALMERS JOHNSON, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (2001) (discussing the unintended consequences of American policies).

seen on a global scale. Workplace associations can help blunt this trend. Rather than being inconsistent with national security, workplace associations can be a vital component to the nation's security.

The United States also stands to gain security from promoting freedom of association on a global scale. Workers exercising freedom of association have demonstrably higher salaries than those who bargain individually.²⁷⁰ The Advisory Committee on Labor Diplomacy (ACLD), a division of the State Department, has reported that better-paying work can deter terrorism. The ACLD's Report to the President and the State Department, released May 10, 2002, found that the lack of protection for trade unions in the Middle East was a contributing factor to the poverty in the region, and then to social unrest.²⁷¹ The report found that many of the Pakistanis that had joined the Taliban in the fight against the U.S. were low-wage workers or seasonal farmers.²⁷² It should be noted that some ACLD members were skeptical of the effect that trade unions could have to deter terrorism. Former U.S. Secretary of Labor Ray Marshall, for one, said that developing countries might be "hostile to trade unions" regardless of their democratic benefits.²⁷³ There are certainly limits to the effect that an independent trade union movement can have on terrorism, but the considered judgment of international bodies such as the World Bank, as well as the current foreign policy of the United States, is that economic prosperity in terrorist-breeding countries should reduce terrorism. The ACLD Report adds that economic development includes the increased prosperity brought by the full protection of freedom of association.²⁷⁴

Further, there is no historical or empirical support for many of the concerns about the negative effects of freedom of association on security. Indeed, strikes are meant to destabilize in order to increase the leverage that

270. See David G. Blanchflower & Alex Bryson, *Changes Over Time in Union Relative Wage Effects in the UK and US Revisited*, in INTERNATIONAL HANDBOOK OF TRADE UNIONS 197, 215 (John T. Addison & Claus Schnabel eds., 2003) (placing union wages in the U.S. from 1973 to 2001 as 18% higher than nonunion wages in all sectors); John Delaney, *Contemporary Developments in and Challenges to Collective Bargaining in the United States*, in INTERNATIONAL HANDBOOK OF TRADE UNIONS 502, 508 (John T. Addison & Claus Schnabel eds., 2003) (noting that the average earnings premium for unionized workers over nonunionized workers from 1990 to 2001 was 30.4%).

271. See Release, U.S. Dept. of State, *Labor Diplomacy: In the Service of Democracy and Security* (Dec. 31, 2001), available at <http://www.state.gov/g/drl/rls/10043.htm> (discussing how unionization within politically unstable and socioeconomically underdeveloped nations would help U.S. security interests).

272. *Decent-Paying Work Can Deter Terrorism, Labor Advisory Panel Says in New Report*, Daily Lab. Rep. (BNA), May 15, 2002, at A-12.

273. Catherine Hollingsworth, *Labor Diplomacy Panel Shifts Focus of Second Report to Fighting Terrorism*, Daily Lab. Rep. (BNA), Nov. 15, 2001, at A-9.

274. See Louis Uchtielle, *Were the Good Old Days That Good?* N.Y. TIMES, July 3, 2005, at 7 (noting a three point increase in productivity annually since 1995, while median family income has experienced 0.9% negative growth since 2000).

they provide to workers, but there are limits in U.S. and international law that adequately take into account legitimate national security concerns. While collective bargaining leads to more “process” in the workplace, presidential and congressional concerns that “inflexibility” will lead to weakened national security are not borne out by years of experience. Finally, providing full labor law remedies to undocumented immigrants who are fired for union activities will not result in increased immigration endangering our borders. In short, there is no evidence that collective bargaining harms national security, while there is some evidence that labor’s freedom of association might enhance security.

B. The Constraints of Domestic Law

Domestic constitutional and statutory law will not stop the collision of liberty and security. The earliest First Amendment cases show that political liberties were tempered in wartime and in periods of domestic insecurity. The political fluctuations of the NLRB described earlier mean that the NLRA will continue to provide inadequate protection for labor’s freedom of association. While there are pushes toward greater freedom of association among academics and legislators, these movements face stiff opposition.²⁷⁵ For example, the Employee Free Choice Act would require an employer to bargain with a union upon the showing of membership cards signed by a majority of the employees, thus bypassing the NLRB election process in which the employer thwarts interest in unionization.²⁷⁶ However, the legislation has little hope of passing a Republican-controlled Congress or President Bush. In addition, domestic constitutional law has accepted limits on association in times of national security for so long that it is unlikely to provide relief.²⁷⁷ Moreover, there has always been a bifurcation between labor associations seen as primarily for economic purposes and political association, though I have argued above that this bifurcation is unwarranted.

As shown by the PATCO strike and the West Coast port dispute, federal statutes limit the right to strike both by government employees and private sector employees. In the PATCO strike, federal law precluded the workers from going on strike. In the West Coast port dispute, the NLRA

275. See MORRIS, *supra* note 29, at 153 (stating that federal labor law already requires bargaining with employees even before they represent a majority at the workplace).

276. The Employee Free Choice Act, S. 1925 108th Cong. (2003), H.R. 3619 108th Cong. (2003), was introduced in Congress on November 21, 2003.

277. See Christopher L. Eisgruber & Lawrence G. Sager, *Civil Liberties in the Dragon’s Domain: Negotiating the Blurred Boundary between Domestic Law and Foreign Affairs After 9/11*, in SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 163 (Mary L. Dudziak ed., 2003) (discussing how the boundaries between domestic law and foreign affairs have been blurred since 9/11).

gave the President the right to stop a strike in a time of purported national emergency. In both cases, however, domestic law prevented the full exercise of freedom of association and the right to strike. The standard response would be for labor unions to petition Congress to change the statutes. However, this response is completely unavailable in the current political environment.

Constitutional challenges might also be mounted, either under the constitutional rights of public employees, or as a challenge to the President's executive authority. However, these challenges have already been considered and rejected.²⁷⁸ First, the government has a large degree of constitutional latitude when acting as an employer, such as when it balances constitutional free speech rights with government efficiency.²⁷⁹ Second, President George W. Bush's expansion of executive power since 9/11 in the area of enemy combatants and the authority to define torture has barely been limited.²⁸⁰ Under the retrenchment of rights theory, the President's use of authority in areas of foreign policy and war will affect his exercise of authority both as chief executive of the government workforce and in using emergency powers under the Taft-Hartley Act.²⁸¹

278. See *United States v. Int'l Longshoremen's & Warehousemen's Union*, 78 F. Supp. 710, 710 (N.D. Cal. 1948) (stating that national emergencies did not offend the First, Fifth, or Thirteenth Amendments of the Constitution, as violations of the freedom of speech, due process of the law, or involuntary servitude).

279. See *Waters v. Churchill*, 511 U.S. 661 (1993) (stating that free speech cannot be completely censored in a government-run hospital); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (declaring a teacher's First Amendment right to free speech was violated when he was dismissed for speaking about issues of public importance when it was only tangentially related to his employment).

280. See CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 211 (2005) (noting that the Supreme Court's October 2003 term decisions limiting President Bush's authority to conduct the War on Terror affirmed the modest principle that, if the President was going to exercise his power, it had to be subjected to judicial review); Curt Anderson, *Bush Claimed Right to Waive Anti-Torture Laws, Papers Say/ Rumsfeld Ok'd Detainees Stripped, Threatened with Dogs*, PRESS OF ATLANTIC CITY, June 23, 2004, at A4, available at 2004 WLNR 17420812 (quoting a memo titled "Humane Treatment of al-Qaida and Taliban Detainees," in which Bush "accept[ed] the legal conclusion of the attorney general and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time").

281. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detailing the President's exercise of war and emergency powers over enemy combatants); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (same); *Rasul v. Bush*, 542 U.S. 466 (2003) (same); see also Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused,"* 2 SEATTLE J. FOR SOC. JUST. 129 (2003) (discussing various ideas regarding civil liberties limitations when national security is compromised); Stephen J. Ellmann, *Racial Profiling and Terrorism*, 19 N.Y.L. SCH. J. HUM. RTS. 305 (2003) (discussing the prevalence of racial profiling in a heightened security era); Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1 (2002) (detailing media responses to racial profiling in post-9/11

The NLRB decisions and the governmental actions described in Part IV show the difficulty involved in changing domestic law under the current Bush administration and Congress. For that matter, the Clinton administration was unable to pass any change to labor law during its tenure from 1993 to 2001.²⁸² The decisions of federal courts, such as in *Hoffman* and the West Coast port dispute, show that current labor law doctrine has long undervalued labor's freedom of association. These effects have been compounded during periods such as the current post-9/11 era. Thus, labor's freedom of association will not be fully realized without reference to international human rights principles.

C. *The Promise and Peril of International Law*

International instruments protecting freedom of association can ease the stresses that eras of domestic insecurity place on recognized human rights. The place of international law in domestic systems of law has recently become a topic of serious discussion, particularly in light of recent Supreme Court cases that raise the issue of the proper role for international law.²⁸³ Since the United States is in the midst of what is called "a global war on terror," international instruments have provided points of reference in discussions about torture, the law of war, and national emergency. At the same time, there is growing recognition that worker rights to organize

America).

282. When Congress refused to pass an amendment to the National Labor Relations Act that would make it illegal to hire permanent replacement workers during a strike, President Clinton issued an executive order to end the practice on federal contracts. The D.C. Circuit struck down the order as preempted by the NLRA, which guaranteed management rights to hire permanent replacements. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

283. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005) (demonstrating U.S. Supreme Court respect for international policies by citing the United Nations Convention on the Rights of the Child, Art. 37; the United Nations International Convention on Civil and Political Rights (ICCPR) (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; the American Convention on Human Rights, Pact of San Jose, Costa Rica, Article 4(5); and the African Charter on the Rights and Welfare of the Child, Art. 5(3) in its decision striking down the juvenile death penalty); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. & Breyer, J., concurring) (citing to the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women, Art. 1(4)); *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003) (demonstrating U.S. Supreme Court respect for international precedent by citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981); *P.G. & J.H. v. United Kingdom*, Eur. Ct. H.R. (2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); and *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988) in their decision regarding homosexual consensual sex); see also Guy Taylor, *Justices Get Mexican's Appeal*, THE WASHINGTON TIMES, March 28, 2005, at A4, available at <http://www.washtimes.com/national/20050328-125306-6763r.htm> (discussing the debate between Justices Breyer and Scalia on the place of foreign precedent in American constitutional law).

and bargain collectively are international human rights.²⁸⁴ Finally, international law on the suspension of rights during states of emergency is important because it provides standards outside of the limitations of domestic law.

Certain international obligations are indisputably part of American law because they are ratified treaties. For example, Article 22, Section 1, of the International Covenant of Civil and Political Rights (ICCPR), which the United States ratified in 1992, states: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."²⁸⁵ Section 2 of Article 22 goes further: "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedom of others."²⁸⁶ Professor Charles Morris has argued that "the federal courts and the NLRB have an obligation to interpret and enforce the NLRA in conformance with Article 22 of the Covenant."²⁸⁷

Finally, the American Convention on Human Rights, Article 16, Section 1, states: "Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports or other purposes."²⁸⁸ The American Convention also recognizes the possibility of "restrictions established by law as may be necessary in a democratic society."²⁸⁹ These conventions are not self-executing, meaning that they do not provide a private right of action against the government for their violation, but they are part of the supreme law of the land pursuant to Article VI of the Constitution. Nevertheless, it is often unclear what effect such international human rights should have in domestic law, except in places where reference to the "law of nations" forms the basis for the violation. Even when such treaties are not self-executing, international law scholars have identified the need for adjudicators to interpret domestic laws in a way that does not violate international obligations.²⁹⁰

284. See LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES xi (2004) (detailing "workers' rights violations in the United States in light of international human rights standards").

285. International Covenant of Civil and Political Rights, art. 22, § 1 (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

286. *Id.* art. 22, § 2.

287. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 146 (2005).

288. American Convention on Human Rights, art. 16, § 1 (Nov. 22, 1969), available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>.

289. *Id.* art. 16, § 2.

290. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 203 (2d ed. 1996);

The place of International Labor Organization (ILO) norms in U.S. law is more problematic, given the United States' schizophrenic attitude toward the ILO, an arm of the United Nations based in Geneva, Switzerland. The U.S. is a member state in the ILO but has not ratified all of the Conventions promulgated by the body. Notably, the United States has refused to ratify the core associational and collective bargaining conventions, arguing that its existing laws adequately protect the rights in the conventions. In 1998, however, the ILO declared that all member states, as a condition of membership, were bound by four core principles in the Declaration on Fundamental Principles and Rights at Work ("Fundamental Declaration"), regardless of whether or not they had ratified the individual conventions, including the principles embodied in Conventions 87 and 98. Convention 87 provides workers the right, "without distinction whatsoever . . . to join [and establish] organisations [sic] of their own choosing."²⁹¹ Convention 98 requires ratifying countries to provide "adequate protection against anti-union discrimination" in respect of their employment.²⁹²

The Fundamental Declaration, while not binding as international law, reaffirms the normative principle that labor's freedom of association is a recognized human right.²⁹³ Indeed, if we take the assertions of the U.S. government seriously that domestic law already expresses the same norms in Conventions 87 and 98, then the application of the Declaration would be relatively non-controversial.²⁹⁴ Moreover, as discussed above, labor's freedom of association is indisputably part of international instruments that the U.S. has ratified. Disputes about whether or not the Declaration, like other declarations of international organizations, may represent customary international law are likely to continue for some time.

Carlos M. Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143 (1992) (describing the rights and obligations member countries have toward nationals of the countries with whom they have formed pacts).

291. International Labour Organization Convention 87, Freedom of Association and Protection of the Right to Organise, art. 2 (June 17, 1948), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>.

292. International Labour Organization Convention 98, Right to Organise and Collective Bargaining, art. 1 (June 8, 1949), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>.

293. See JAMES A. GROSS, WORKERS' RIGHTS AS HUMAN RIGHTS 1 (2004) (stating that the Wagner Act was far ahead of its time, "guarantee[ing] the right to organize and bargain collectively, core social justice issues for workers"); Philip Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 457-58 (2004) (arguing that the "core labour standards" regime needs to anchor its principles in the relevant ILO standards).

294. COMPA, *supra* note 284, at 42 n.52 (stating the United States' position that the ICCRP Article 22 provisions are different in scope from the ILO Convention 87 rights and obligations).

Nevertheless, the emerging jurisprudence of the Alien Tort Claims Act (ATCA) is already moving toward the recognition of the freedom of association as part of customary international law. *Estate of Rodriguez v. Drummond Co.*,²⁹⁵ a case brought by Colombia citizens seeking redress against the U.S. company Drummond Coal for a "violation of the law of nations,"²⁹⁶ was one of the first cases to test for freedom of association as a predicate for ATCA jurisdiction. The company was accused of complicity or knowledge in a number of murders and kidnappings of trade union activists in Colombia,²⁹⁷ which if true, would violate not only *jus cogens* norms against murder and torture but would also operate to chill freedom of association. In a ruling on a motion to dismiss, and after canvassing numerous instruments that pointed to a general international norm of respect for freedom of association, the court held that the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants' motion to dismiss.²⁹⁸ The court admitted that its ruling was "reluctant" but compelled by the preliminary posture of the proceedings, where the plaintiffs' allegations are assumed to be true, and the "international conventions, international customs, treatises, and judicial decisions rendered in this and other countries."²⁹⁹

Ironically, the broad concepts embedded in the international freedom of association instruments discussed above have been given content in the aftermath of the Supreme Court's *Hoffman* decision. As discussed above, the ILO's Committee on Freedom of Association found: (1) that the *Hoffman* decision did not comply with ILO Convention 87; and (2) that the United States should explore all options to rectify the decision, including changing national laws. The Committee's conclusion shows the breadth of labor's international right of association. This is because the *Hoffman* case did not hold that Jose Castro, the undocumented worker who was without a remedy for his organizing because of his immigration status, was not covered by the law; instead, the Court ruled that the remedy would be inconsistent with immigration control. The Committee's unwillingness to believe that immigration control should trump labor rights once a worker was *inside* the country shows that freedom of association is an important right.

Similarly, the right to associate encompasses not only those who seek to form a union and are thwarted by employer opposition but also the workers in the NLRB decisions who simply sought their coworkers'

295. 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

296. 28 U.S.C. § 1350 (2000).

297. *Estate of Rodriguez*, 256 F. Supp. 2d at 1260.

298. *Id.* at 1264.

299. *Id.* at 1264 (citing *Aquamar S.A. v. Del Monte Fresh Produce, N.A.* 179 F. 3d 1279, 1295 (11th Cir. 1999)).

assistance in disciplinary interviews with their employer or sought to exercise the right to strike. These decisions can be viewed as “failure to enforce” cases, where a different result would be obtained if the law was interpreted with international principles. These are all private party cases dealing with judicial or administrative decision-making, which would benefit from reference to the international right of association.

The reorganization of the federal personnel systems, the exclusion of TSA screeners, and the West Coast port dispute are all examples of the government directly using national security as a reason for its actions. On one level, international human rights instruments accept some limits on freedom of association in the name of national security. For example, Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) expressly recognizes that freedom of expression is subject to restrictions. The ILO conventions also place limits on the extent to which public sector rights can be abridged. In complaints against the United States government submitted to the ILO’s Freedom of Association Committee (“the Committee”) in 1990, the AFL-CIO alleged that Title VII of the Civil Service Reform Act of 1978 “restricts at the federal level the scope of collective bargaining by excluding wages and other monetary issues [as non-negotiable] and by providing for the excessive protection of management rights” in violation of ILO Conventions 87 and 98.³⁰⁰ The Committee stated that for “certain subjects in the public sector. . . certain matters that clearly appertain primarily or essentially to the management and operation of government business [can] reasonably be regarded as outside the scope of negotiation.” However, the Committee concluded that “exclusion from the bargaining process of wages and other benefits and monetary items does not meet the requirements of the principle of voluntary collective bargaining.”³⁰¹

The national security and public order exceptions to rights enumerated under the ICCPR were discussed in *Tachiona v. Mugabe*, an Alien Tort Claims Act case in which citizens of Zimbabwe brought suit against Zimbabwe government officials for violations of rights of association, assembly, and expression and beliefs.³⁰² The court stated that “under certain exigencies threatening safety, security or public order, the state may justifiably impose reasonable restraints” on the exercise of freedoms enumerated in the ICCPR.³⁰³ However, the court also stated that the

300. Complaints Against the Government of the United States Presented by the AFL-CIO and the Public Services Int’l (PSI), Rep. No. 284, Case No. 1557 (ILO Freedom of Ass’n Comm. 1990), available at <http://www.ilo.org/ilolex/index.htm>, (Follow “specific country” hyperlink, then “United States” hyperlink, then “Freedom of Association” hyperlink) (last visited Jan. 15, 2006).

301. *Id.*

302. 243 F. Supp. 2d 401 (S.D.N.Y. 2002).

303. *Id.* at 433.

exceptions are "strictly construed by the authorities that have ruled on it, [and] are circumscribed by the limitations."³⁰⁴ The court then held in favor of plaintiffs that there was "no evidence in this case of the existence of any public emergency officially proclaimed, or any necessity of national security or public order, that may have presented even colorable grounds to justify the state's actions as a warranted derogation from its obligations to ensure Plaintiffs' rights."³⁰⁵ The *Tachiona* case shows the high bar that international law places in order to claim a national security exemption from protected rights.

With regard to the suspension of labor rights under the ILO Conventions, the ILO's Committee of Experts has noted:

[A] state of emergency is frequently invoked to justify exemptions from the obligations arising under the Conventions on freedom of association, but . . . such a pretext cannot be used to justify restrictions on the civil liberties that are essential to the proper exercise of trade union rights, except in cases of *extreme gravity*. Any such restrictions must be *limited in scope and duration* to what is *strictly necessary* to deal with the situation in question. While it is conceivable that the exercise of some civil liberties, such as the right to public assembly or the right to hold street demonstrations, might be limited, suspended and even prohibited, it is not permissible that the guarantees relating to the security of the person should be limited, suspended or abolished.³⁰⁶

Such pronouncements place a heavy burden on the government to show why national security is truly threatened by low-level employees having collective bargaining rights. The claims the U.S. government has made about the "greater flexibility" needed to fight the War on Terror do not seem to meet the burden set by international standards. Administration officials' use of national security as a pretext for ending labor's freedom of association, reorganizing federal personnel systems, and excluding airport screeners from collective bargaining would not conform to ILO principles (even if they conform to domestic law).

The question of the recourse available for violations of the ILO conventions remains. As stated above, there is little the ILO will do except implore the government to comply with international standards. The value of international condemnation should not be underestimated. International bodies will also take into account the climate of retrenchment of civil liberties in evaluating claims of national security exceptions to labor's

304. *Id.*

305. *Id.*

306. Lee Sweptson, *Human Rights Law and Freedom of Association: Development Through ILO Supervision*, 137 INT'L LAB. REV 169, 179 (1998) (emphasis added).

freedom of association. It is unclear whether or not the ILO has the will to criticize the U.S. government harshly for its labor-related actions in the War on Terror. The most recent opinion from the ILO, regarding the *Hoffman* decision, took the U.S. to task for failing to enforce the labor rights of migrants. The AFGE's ILO complaint remains to be resolved. Thus, the ILO could provide a powerful voice by calling the U.S. government's actions into question, but it must be remembered that the ILO lacks any power to enforce its recommendations.

This is why U.S. courts must engage in searching judicial review of government actions using international principles. While many would object to the introduction of international concepts into U.S. courts, international law is increasingly becoming accepted through many of the avenues discussed earlier, such as the Alien Tort Claims Act, the Universal Declaration, and constitutional cases that rely on a consensus of nations. While these instruments may not be self-executing or lack a private right of action, courts should look to these principles in deciding whether the national health and safety is imperiled, or whether national security requires the exclusion of certain workers from bargaining.

In all of the post-9/11 examples that I have discussed, the three branches of the United States government have constricted labor's freedom of association, even though no impact on national security existed. In the *Hoffman* decision, even though the Supreme Court did not explicitly connect national insecurity and labor rights for undocumented immigrants in its decision, the connection between immigration control and the threats posed to the U.S. in the months after 9/11 was a sub rosa factor in the Court's decision. While international law must be tempered by concerns of national sovereignty, it is unclear that the standards used to end the West Coast port dispute in the name of national security are justifiable even under domestic law. Nevertheless, it is clear that labor unions *and* employers whose disputes affect interstate commerce will face the government's argument that increasing outsourcing of military functions requires the free flow of commerce as a national security imperative.

The courts' acquiescence to the Executive Branch's national security arguments may only embolden the administration to accomplish its objectives under the rubric of national security. The statute creating the Department of Homeland Security in 2002 took away many bargaining rights for several classifications in the department, and the 2005 regulations for the DHS and the Department of Defense went even further. Again, the government's national security rationale seems to fall below the burden placed on nations by international law. Finally, the NLRB's decision in *IBM Corp.* itself may violate freedom of association principles, and it is clear that no national security exception would apply, since the decision is intended to safeguard private employers, not the government entities that

would have standing to utilize the exception.

The difficulty is to determine where the line will be drawn. Since 9/11, however, the U.S. government has failed to show that collective bargaining and freedom of association are inconsistent with national security. These instruments require a declared state of emergency before customary labor protections can be curtailed. Although the government declared a state of emergency for a brief period after 9/11, according to Kim Lane Scheppele, the administration has acted as if the emergency powers have continued to override national laws.³⁰⁷ As Michael Ignatieff has pointed out: "An emergency is just that: a temporary state, not an indefinite and open-ended revocation of the rule of law."³⁰⁸

In all the cases discussed above, the labor law adjudicative bodies had to reconcile competing questions of immigration control and labor remedies (*Hoffman*), the right to strike and the interests of the employer (*IPS*), and the right to have coworkers present in disciplinary actions and the ability of the employer to conduct the investigation (*IBM*). Neither federal statutory law nor precedent provided clear answers to these questions, and in each case, labor's freedom of association was weakened. The use of international principles to guide the decision-making process should be used to guide the results in future cases.³⁰⁹

VI. CONCLUSION

The historical dialectic between liberty and security continues in post-9/11 America. Many feel that all civil liberties have been compromised in the name of national security. However, the rights of workers to organize and bargain collectively, as recognized by federal labor law and international human rights instruments, can only flourish in an environment

307. See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004) (describing the Bush administration's willingness to invoke emergency powers to make domestic and foreign policy); see also Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004) (providing for a new constitutional framework in the present state of emergency created by terrorist attacks). But see David Cole, *The Priority of Morality: The Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004) (casting doubt on Ackerman's proposal of an emergency constitution and suggesting that the model fails to address the threats that the war on terror has imposed on civil liberties); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004) (criticizing Ackerman's emergency constitution proposal and suggesting it is time to move away from the survivalist stance of post-September 11).

308. MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN THE AGE OF TERROR* 51 (2004).

309. It should be noted that advocates have not forcefully made international arguments in the Board or the Courts. For example, neither the NLRB nor any of the amici in the *Hoffman* case cited to international law in their briefs, according to a July 12, 2005 search of the WESTLAW SCT-Brief database.

of respect for other civil liberties essential to democratic societies—the right to protest, the freedom of speech, and the right to vote. The International Labor Organization has recognized this thesis with respect to the rights in the Universal Declaration of Human Rights, which protects the freedom of association, and in particular the right to organize trade unions:

The guarantees set out in international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments are genuinely recognized and protected.³¹⁰

Unfortunately, the fragility of civil liberties in the United States has become evident after the terrible attacks of 9/11. The post-9/11 era can be seen as simply the next chapter in a national dialectic between liberty and security. The historical text on the post-9/11 era is incomplete, however, so there are conflicting signals about whether civil rights and civil liberties will be permanently constrained.

This Article has examined the impact that limitations on the “political” civil liberties, such as the right to assemble and protest, can have on the right to organize and bargain collectively. Reliance on domestic law alone will not prevent the collision of security and worker rights because constitutional liberties have frequently been limited during wartime. Domestic law enforcement and judges have sometimes operated in a state of self-imposed emergency that has resulted in limitations on rights protected by domestic law. Thus, international rights of freedom of association will have to be utilized in both the public and private sectors. International law provides both promise and peril, however, because instruments protecting freedom of association incorporate the need to balance national security against free association.

The War on Terror might be said to have only an indirect effect on labor’s freedom of association. Few would doubt that the Bush Administration did not consider labor an ally even before 9/11.³¹¹ Many of the actions taken by the President since 9/11 may be reversed by later administrations. The prospects for serious change under either Democrats or Republicans is belied by the inability of past Democratic administrations to enact serious change and the bipartisan fear of seeming “soft” on national security. The indirect and subtle weakening of labor’s right of association through the War on Terror is more long-lasting. Actions taken

310. Gernigon, *supra* note 35, at 13.

311. See Rick Fantasia & Kim Voss, *Bush’s Low Intensity War on Labor*, COUNTERPUNCH, June 18, 2003, available at <http://www.counterpunch.org/fantasia06182003.html> (noting that the Bush administration had previously shown “indifference to workers and contempt for their unions”).

since 9/11 may seriously damage the long-term prospects for a new upsurge in the power of labor's freedom of association.³¹²

312. See DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* 163 (2003) (suggesting that the 9/11 terrorist attacks distracted the labor movement's focus on neoliberal policies and institutions); RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 163 (2004) ("[T]he context of severe national emergency has been the pretext for invoking the mantle of national security against unions in an effort to accomplish the long-term Republican Party goal of denying the right of federal employees to join unions.").